REPORTS

OF

CASES

ARGUED AND RULED

AT

Nisi Prius,

IN THE

COURTS OF KING'S BENCH

AND

COMMON PLEAS,

From Easter Term 39 George III. 1799,
To Hilary Term 41 George III. 1801.

By ISAAC 'ESPINASSE,

OF GRAY'S INN, ESQ. BARRISTER AT LAW.

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NAMES
OF THE
CASES REPORTED
IN THIS THIRD VOLUME.

Keeves,

CASES

ARGUED AND RULED

AT NISI PRIUS,

IN

KING'S BENCH,

EASTER TERM, 39 GEO. III.

SITTINGS AFTER TERM AT WESTMINSTER.

STONE *v.* CARR.

May 9th.

Tho' a husband is not bound to provide for the children of his wife by a former husband, yet if he takes them into his house, and they become part of his family, he shall be deemed to stand *loco parentis*, and be liable in a contract made by his wife for their education.

THIS was an action of assumpsit, brought by the Plaintiff, who was a schoolmaster, for the education and maintenance of an infant child.

The child was the son of the Defendant's wife, by a former husband. On the Defendant's marriage with the child's mother, he had taken possession of an house, which she occupied with her children, and which house had belonged to the first husband: the business she had carried on was continued; and the children were suffered to live with him as part of the family, and provided for by him while he was at home.

For the Defendant it was given in evidence,—that he was gunner of an India ship; that during his absence on a voyage, the boy had been put out to school by his mother to the Plaintiff. His counsel then contended, that as he had never made any contract or agreement with the Plaintiff, he could not be charged, by reason of any implied liability; and cited the case of *Tubb* v. *Harrison*, 4 Term Rep. 118; wherein it is expressly decided, that a husband is not liable for the education or maintenance of a child his wife may have had by a former husband.

Lord *Kenyon*, after referring to the case cited, said, the present was distinguishable from that: there was no doubt, if a man married a woman having children by a former husband, he might refuse to provide for them; and under the authority of the *King* v. *Munden**, cited in that case of *Tubb* v. *Harrison*, he could not be compelled to do it; but if a man did not so refuse to entertain them, and took the children into his family, he then stood *loco parentis* as to them. Such was the case here: he had so adopted them, and having gone abroad, and left them in the care of his wife, he should hold him to be bound by her contracts made for their maintenance and education. If she had any property by her first husband, the case was stronger; for then part of the property, of which the Defendant possessed himself,

* Rex v. Munden—1 Stra. 190.

This was an order on the Defendant to provide for his wife's mother; and by the opinion of the Court of King's Bench, the order was quashed. The statute which enables an order of maintenance to be made to provide for relations, extending to *natural relations only*.

the

belonged to the children: but even had their father died insolvent, it would not alter his opinion. The Defendant, on his marriage, had no right to take possession of the house and business: he had thereby confounded all the boundaries of the property, and placed himself in a state of responsibility. He therefore directed the Jury to find a verdict for the Plaintiff; which they did.

Erskine and *Lawes* for the Plaintiff.

Gibbs and *Espinasse* for the Defendant.

ALFRED *v.* MARQUIS of FITZJAMES.

A servant who comes over from the West Indies, where he has been a slave, and who continues in the service of his master in England, without any agreement for wages, is not entitled to any, unless there has been an express promise.

ASSUMPSIT for servant's wages.

Plea, *Non-assumpsit.*

The Plaintiff proved his employment as a servant in the family of the Defendant, and relied on a *quantum meruit* for the time he had served.

It appeared in evidence, that the Plaintiff came over from *Martinique* with the Duchess of *Fitz-james*, then Mademoiselle *Le Brun*. His father and mother had been slaves on an estate belonging to her in that island. He had entered into her service in *Martinique*, and continued to serve her after her marriage; and the Duke found him with necessaries of every description. There was no contract for any hiring for wages; but a witness said, that the Marquis had been heard to promise to pay him wages.

Lord KENYON asked Mr. *Erskine*, counsel for the Defendant, if he objected to the demand *in toto*.

Mr. *Erskine* said, he did; that the contract was not a contract for any wages in *Martinique*; and had so continued in this country without any variation.

Lord KENYON said, he was prepared to give a decided opinion: That up to the time of the promise to pay wages, which the witness had said the Defendant had made, the Plaintiff had no title to recover, as there was no original contract of service for wages.

Garrow and *Lawes* for the Plaintiff.

Erskine for the Defendant.

MOISES *v.* THORNTON, M. D.

To prove a party a Doctor of Physic, pursuant to an averment in pleading to that effect, it is not of itself sufficient evidence to produce a diploma, under the seal of the University of St. Andrew, in Scotland.

THIS was an action for slanderous words.

The declaration stated, "That the Plaintiff was a Physician, and had duly taken the degree of a Doctor of Physic;" and then averred, that the Defendant speaking of him as a physician, used these false and slanderous words: "*He is a Quack, and never had a diploma: if he produces one, it is a forgery.*"

In support of the averment in the declaration, that the Plaintiff "was a physician," and had duly taken the degree of "Doctor of Physic," the Plaintiff's counsel proceeded in evidence a diploma from the university of *St. Andrew*, in *Scotland*, under a seal, which was stated to be the seal of that university.

To

To establish the validity of this instrument, the attorney for the Plaintiff was called. He proved that he had gone into *Scotland* for the purpose: he had been present at a corporate meeting of the members of the university, the Rector and professors: they acknowledged to him, that the signatures signed to the diploma produced, were their respective hand's-writing, and that it had been granted in full senate. He further proved, that each professor signed a certificate in his presence (agreeing with their hand's-writing signed to the diploma) and which certificate was produced. But he admitted that he had no previous acquaintance with the university, its constitution, or mode of conferring degrees, or any knowledge of the professors, except as he had given in his evidence in chief.

Lord KENYON expressed a doubt, whether this evidence was sufficient to support the allegation in the declaration.

The plaintiff's counsel contended, that public and corporate bodies could speak only by their seal, which was the only authentic document of a public act: that the university of *St. Andrew* was recognised as a university by the act of union, and of course had a power to confer degrees, of which the only evidence was some public instrument under the university-seal conferring such degree; that the mere production of it ought therefore to be sufficient: but that the evidence here carried the matter still farther, by proving the admission of those by whom the corporate act was done, which placed its authenticity beyond a doubt.

For the Defendant it was insisted, that the allegation in the declaration should be made out by strict evidence; that it was not sufficient to produce a diploma, unless the Plaintiff also showed that the university from which it had issued had power to grant it, and the persons whose names were to the diploma were properly authorized, and the seal of a university so constituted as to have the power of conferring degrees.

Lord KENYON. I cannot take the evidence as offered. The foundation of the whole is, that there has been a corporate act done. The most authentic evidence must be given in a court of justice; and you cannot stop short of it. I take notice of a seal; I must know that this degree, or diploma, which purports to be a corporate act, must be conferred under the authenticity of a seal; which authentically delivers the judgement of the university at the time. If this is offered in evidence as the original act of the university, the Plaintiff should prove that it is their original act, by producing the original book of the university, or by proving that the seal is the seal of the university. This should be done by a person acquainted with the university; not as it is done by a witness unacquainted with the university, ignorant of its constitution, or even whether they have any power to confer degrees or not. But it is attempted to be made good by the certificate: that is not a copy of the original act, which, if compared with the original, might be evidence: it is a certificate that some corporate act was done; but it is no evidence of that corporate

act.

act. The evidence offered does not therefore satisfy the allegation; and the plaintiff must be nonsuited.

Erskine, *Gibbs*, and *McIntosh* for the Plaintiff.

Garrow and *Raine* for the Defendant.

In the next term the Plaintiff moved for a new trial, and obtained a rule; but the court of King's Bench agreed in opinion with Lord KENYON, and discharged the rule.

SMITH *v.* MACDONALD.

May 18.

If a party is indicted for a felony, though he is acquitted without calling any witnesses, he cannot maintain an action for a malicious prosecution, if his acquittal was the result of deliberation, and the evidence sufficient to caufe the jury to pause.

THIS was an action on the case, for malicious prosecution.

Plea of Not Guilty.

The case, as it appeared in evidence, was, that the Defendant had caused the Plaintiff to be taken up and committed to prison for a capital felony; having charged him and two other persons with having stolen his pocket-book; that the Plaintiff had been kept in prison three weeks; and had been indicted for the offence at the Old Bailey, and acquitted.

It appeared, that at the trial at the Old Bailey, after the evidence for the prosecution was finished, the jury having deliberated for a short time, acquitted the Plaintiff and one of the other prisoners indicted with him, without calling any witnesses, or putting him on his defence; and that witnesses had been called for the third, and he also was acquitted.

Upon this evidence Lord KENYON said, he was of opinion the Plaintiff ought to be nonsuited. This was an action for malicious prosecution, to which a probable cause was the decisive answer. It was of importance that prosecutions for offences should not be discouraged, at the same time that the liberty of the subject should be protected. A person might be acquitted, though the prosecutor had the best grounds for the prosecution he had instituted, and the presumption of guilt was strong. That if the evidence offered to the jury at the trial of the indictment was sufficient to cause them to pause, he should hold it a probable cause.

The Plaintiff was nonsuited.

Mingay, Knowlys, and *Marryat* for the Plaintiff.

Erskine and *Garrow* for the Defendant.

EXALL *v.* PARTRIDGE, JONES, & *alt.*

Where there are three joint lessees, and two of them assign their interest to the third, but the landlord has not consented to accept his sole liability, the goods of the Plaintiff being put on the premises by the permission of such third lessee, and distrained by the landlord for rent, and he having paid it, the three lessees are liable to him for money paid to their use.

ASSUMPSIT for money paid, laid out, and expended, with the common money-counts.

Plea, *Non-assumpsit.*

The three Defendants in this case, were the joint lessees by deed, of certain premises in *Mary-le-bone*, to a person of the name of *Walsh*, where they carried on the business of coach painters. Two of the lessees assigned their interest to *Partridge*, their colessee. He was employed by *Exall* the Plaintiff, who was a coach-maker, and suffered him

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to put several of his carriages on the premises. While they were there, the rent being in arrear to *Walsh*, he entered on the premises to distrain, and took the carriages belonging to the Plaintiff, which he found on the premises, as a distress. The Plaintiff paid the amount of the rent (35*l.*) to redeem his carriages, and now brought the present action to recover that sum from the three Defendants, as money paid to their use.

The Plaintiff gave in evidence, the notice of the distress which was to the three Defendants, and a receipt for the rent in their name; and proved by *Walsh*, the landlord, that he had never consented to the assignment made to *Partridge*, but continued still to hold them all liable to him for the rent.

The Counsel for the Defendant contended, that the whole interest in the premises being vested in *Partridge*, and he only being liable for the rent, the money must be held to be paid to his use only: that as the goods of the Plaintiff were entrusted to *Partridge* only, he only was liable for their being returned; and as the money was paid to redeem the goods, and no responsiblity was attached to two of the Defendants, they could be subject to no liability on account of them: that to call upon them therefore to repay this money, would be to make them debtors against their consent, by a voluntary payment made by the Plaintiff.

It was answered by the Plaintiff's counsel, that though *Partridge* only was ultimately liable, that was by means of a private agreement between themselves, to which the Plaintiff was not a party; but at

at the time of the distress, they were all jointly liable to the landlord; the distress was made on them all jointly, the notice of distress was on them jointly, and they were jointly benefited by the payment. That it was not a voluntary payment, whereby the other two Defendants were made debtors, but a compulsory one, under the coercion of the distress, and to redeem the Plaintiff's goods, which had been wrongfully taken for the debt of the Defendants.

Lord KENYON was of opinion, that as the sole possession of the premises was in *Partridge* only at the time of the distress, which circumstance was known to the Plaintiff, and he solely liable to the rent, by reason of the assignment of his co-lessees to him, — the money paid could be deemed to have been paid to his use only, and not to that of the two other Defendants; and nonsuited the Plaintiff.

Garrow and *Espinasse* for the Plaintiff.

Erskine for the Defendant.

Vid. 8 T. Rep. 309. In the next term a new trial was moved for; when his Lordship changed his opinion, with which the rest of the court concurred, and a new trial was granted.

SITTINGS

SITTINGS AFTER TERM AT GUILDHALL.

DEAN v. ALLALLEY.

THIS was an action of covenant.

What erections the outgoing tenant may carry away from the premises.

The Defendant was lessee of some premises, under a lease from the Plaintiff. One of the covenants was, That the Defendant should leave all the buildings which then were, or should be erected on the premises during the term, in repair, &c. The breach assigned was, That the defendant took down and carried away two sheds, which had been erected during the term on the premises.

Defendant pleaded performance of the covenants, and issue on the breach, as above assigned.

The buildings in question were two sheds, called *Dutch Barns*, which had been erected by the Defendant during his term; and which, his counsel contended, he had by law a right to remove.

Lord KENYON. If a tenant will build upon premises demised to him, a substantial addition to the house, or add to its magnificence, he must leave his additions, at the expiration of his term, for the benefit of his landlord: but the law will make the most favourable construction for the tenant, where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been held so in the case of cyder-mills, and in

 other

other cases; and I shall not narrow the law, but hold erections of this sort, made for the benefit of trade, or constructed as the present, to be removable at the end of the term.

Gibbs contended, that by the express words of the covenant, the tenant was to leave all erections made on the premises at the end of the term.

Lord KENYON. I am aware of the full extent of that, and not quite sure that it concludes the question. It means, that the tenant shall leave all those buildings which are annexed to and become part of the reversionary estate.

Garrow and *Jervis* for the Plaintiff.

Gibbs for the Defendant.

Vide *Shaw* v. *Fitzherbert*, 1 *H. Black.* 258, *ex parte Quincy*, 1 *Atk.* 477.

DAWES *v.* PECK.

Where goods are sent pursuant to order by a carrier, as directed by the consignee, the property is so out of the consignor, that he can maintain no action against the carrier for the loss of them.

THIS was an action on the case, against the Defendant, who was a common carrier, to recover the value of two casks of gin.

A Mr. *Odey*, living at a place called *Hill-Morton*, in *Warwickshire*, had ordered two casks of gin from the Plaintiff. The goods were sent pursuant to order, directed to Mr. *Odey*, *Hill-Morton*, near *Rugby*, *Warwickshire*, by *Peck's* waggon. A witness for the plaintiff proved the delivery of the casks at the place where the Defendant's waggon took in goods, and payment for the booking.

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The goods were regularly sent by the waggon; but as it did not go through *Hill-Morton*, the casks were left at a place called *West-Haddon*, near *Hill-Morton*, on the direct road which the waggon travelled. They were not taken away within the time mentioned in the permit; in consequence of which they were seized.

For this negligence in not delivering them, the present action was brought.

The defence relied on by the Defendant's counsel was, that the action was ill brought in the name of the Plaintiff, the consignor; and that it should have been in the name of Mr. *Odey;* in whom, they contended, the legal property of the goods was vested.

To prove this, they produced a letter from the Plaintiff to *Odey*, after the seizure; in which he stated, that the casks were sent exactly conformable to his orders, and as directed; and concluding, "as the goods have been sent conformable to your orders, and by the carrier you directed, I shall look to you for payment of the amount of the goods."—This letter was contended by the Defendant's counsel to be an admission by him that there was no property whatever in the goods in him; and that of course he could not maintain any action for the loss. That in point of law, where goods are ordered to be sent by a particular carrier, a delivery to that carrier is a delivery to the consignee, and vests the property from that moment in him.

The Plaintiff's counsel contended, that the property was not so divested out of the consignor, but that

that he might maintain an action for the loss of the goods, and that it had been so decided.

Vid. Vayle v. Bayle, Cowp. 294.

Lord KENYON said, that he was of opinion that the consignor, by the delivery stated, had fixed the consignee with the goods; and that no property resided in him: that that disabled him from bringing the action for the loss of the goods, as it was clear, that that loss must fall on *Odey* the consignee, who might certainly maintain an action for them; and which, if he did bring, the Defendant could not avail himself of the recovery had against him in this action for his defence; so that he might be twice charged.

His Lordship therefore directed a nonsuit.

Garrow and *Yates* for the Plaintiff.

Erskine and *Raine* for the Defendant.

In the next term the Plaintiff's counsel moved for a new trial, and relied on the cases of *Davis* v. *James*, 5 *Burr.* 2680, 2. *Moor* v. *Wilson*, 1 Term Rep. 659; wherein it had been held that the consignor, as well as consignee, might maintain this action. But the court concurred in opinion with Lord KENYON, that the nonsuit was right, and took the distinction, that in those cases the right of the consignor to maintain this action, turned upon his having entered into a special contract with the carrier to pay him for the carriage of the goods.

WATSON

Watson *v.* Main.

Trespass, for breaking and entering the Plaintiff's dwelling-house, breaking open doors, and seizing goods, detaining them in Defendant's possession, till the Plaintiff in order to recover them, was forced and obliged to pay a large sum of money.

In order to justify the landlord in seizing, within thirty days, goods removed off premises, as a distress for rent, wherever found, under stat. 11 Geo. II. ch. 19, the removal must have taken place after the rent became due, and must have been secret.

The Defendant pleaded, 1st, the general issue; and, 2dly, that the Plaintiff rented a house, and was tenant to the Defendant, at a yearly rent of 25*l.* payable quarterly: that a quarter's rent was due: that the Plaintiff fraudulently and clandestinely removed the goods in question into the house mentioned in the declaration, in order to prevent the Defendant, as landlord, from distraining them. That the Defendant entered the house; in which, &c. the outer door being open, in order to make a distress on the goods so fraudulently removed, and because the door in question (the same being an inner door) was shut and fastened, the Defendant broke it open, and seized the goods as for a distress for said rent, *prout ei bene licuit*, &c.

Replication *de injuria sua propria* traversing the fraudulent removal.

Rejoinder taking issue on the traverse.

It was proved, that the Defendant had been tenant to the Plaintiff of a house in *Exeter Place*, parish of *St. Luke, Chelsea:* That a quarter's rent had become due at *Lady Day*, 1799. On the 14th of *March*, before the rent became due, that the Plaintiff had removed his goods off the premises, in order (as the Defendant

fendant contended) to prevent their being taken as a distress for rent; but it did not appear that it had been done secretly. The goods had been seized within thirty days after their removal; which the Defendant contended he had a right to do, under stat. 11 *Geo.* II. chap. 19.

Eyre, Chief Justice, said, that he was of opinion that the defence could not be supported. The statute said, That, "in case any tenant or tenants, &c. of "any messuages, lands, &c. upon the demise, or "holding whereof any rent, is or shall be reserved, "due. or made payable, shall fraudulently, or clan-"destinely convey away, or carry off from such "premises, his, her, or their goods or chattels, to "prevent the landlord, or lessor, &c. from distrain-"ing the same for *arrears of rent* so reserved, due, "or made payable, it shall and might be law-"ful, &c. within the space of thirty days next after "such conveying or carrying away, to take and "seize same, wherever found, as a distress for the "said *arrears of rent*."

He was of opinion, and had before held, that under this clause of the statute, *Goods removed before the rent actually became due, and was in arrear*, could not be seized for rent; the statute only applying, in his opinion, to where the removal had taken place *after the rent* became due. He was also of opinion, that, in order to subject the goods to be taken, the removal ought to be secret and not open and in the face of day; as in such case the removal could not be said to be clandestine, within the meaning of the statute: and it not being in evidence, in the present case, that the removal was such

such, he thought the plea was not supported: and his Lordship therefore directed a verdict for the Plaintiff; which the jury accordingly found.

Le Blanc, Serj. and *Lawes* for the Plaintiff.

Marshal, Serj. and *'Espinasse* for the Defendant.

CASES

ARGUED AND RULED

AT NISI PRIUS,

IN

TRINITY TERM, 39 GEO. III.

SITTINGS AFTER TERM, AT WESTMINSTER.

Wm. M'Namara and Margaret, his Wife, v. Fisher.

Though the husband is abroad, has lived abroad for many years, and the wife has been paid weekly a sum for her subsistence; and though she has appeared as a *feme sole*, and has contracted as such; if the husband is living at the time of the action brought, no action can be maintained against the wife.

This was a writ of error from the Common Pleas.

The Defendant having brought an action of *assumpsit* in the Common Pleas, for goods sold and delivered, against the Plaintiff *Margaret*, the wife of the other Plaintiff, *William*, she pleaded *Non-assumpsit*, and gave her a coverture in evidence; which the Defendant had answered, by proving that the Plaintiff *William* had lived abroad in the *West Indies* for fourteen years, and that the goods were sold to her as a *feme-sole;* that the husband was still abroad; and that she received from Sir *Richard Neave* an annual allowance of a guinea a week, though not secured

cured by deed. Lord Chief Justice *Eyre*, before whom the cause was tried, being of opinion that this created a personal responsibility in her, he directed the jury to find for the Plaintiff; which they did.

Upon this the present Defendant signed judgment, and the wife (the Defendant Margaret) was taken in execution. She brought a writ of error on this judgment, in her own name, and assigned coverture as error in fact. The Defendant pleaded *in nullo est erratum*. Upon the case being set down for argument in Easter Term last, the court, on the authority of a case in the Year Book, 14 *Ed.* III., cited by Mr. Justice *Lawrence*, that the husband ought not to be joined, quashed that writ of error.

In this term another writ of error was sued out in the name of the husband and wife, without his concurrence, and her coverture was assigned as error in fact, as before.

The Defendant pleaded, that the husband lived separate and apart from the wife by his own desire; and that the *feme* had a separate maintenance duly paid to her.

The Plaintiffs in error took issue on this fact; and it now stood for trial before Lord KENYON.

The same facts were proved as at the former trial.

Lord KENYON. I think these parties have mistaken their way very much, by coming into this court. I have frequently heard it laid down on the other side of the hall, and that from very high authority, that the proper course in such a case is to file a bill against a married woman and her trustees in a court of equity; and I remember a cause standing over,

 because

because that was not done. Here there are no articles of separation: to say, therefore, on this evidence, that there is an end put to the conjugal relation between those parties, is what I dare not say, in point of law or of conscience. I am pretty sure that Lord Chancellor *Ellesmere* has said something in *Belknap's* case (if I recollect right, this case is to be found in Co. Litt. 29) which has laid down the law in that case: it is an old case, and of great authority, to shew that this kind of proceeding cannot take place. There is no evidence here to shew that this woman has a separate maintenance. On this evidence, every man's wife may be said to have a separate maintenance, because her husband, as far as his abilities go, supplies her with money from time to time. There must be a verdict for the Plaintiff.

Erskine and *Barrow* for the Plaintiff.

Garrow and *Henderson* for the Defendant*.

* When the above case was decided, the case of *Rutton* v. *Marshall* was at hearing in the Exchequer Chamber. In that case, the former cases, in which a *feme covert* had been held to be solely liable, on the ground of her having a separate maintenance were fully considered, and the law, as there held, overruled; and by the judgment of the court it was decided, That a *feme covert* cannot contract and be sued as a *feme sole*, even though she be living apart from her husband, and though she has a separate maintenance secured to her by deed.—*Marshall* v. *Mary Rutton*, 8 Term Rep. 515.

Rex v. Walter.

The proprietor of a newspaper is answerable criminally, as well as civilly, for misconduct in the conducting of the paper, as *ex. gr.* for the publication of a libel, though he has nothing to do with the publication, and the whole is conducted by his servants.

This was a criminal information against the Defendant, as the proprietor of a newspaper, called *The Times*, for a libel on the late Lord *Cowper*.

The prosecutor clearly proved the Defendant to be the proprieter of the paper, as well as the falsehood of the paragraph which respected Lord *Cowper*.

The Defendant gave in evidence, that though he was in fact the proprietor of the paper, he had nothing to do with the conducting of it; that he resided entirely in the country; that his son was concerned in the conducting of the paper, without any interference on his part; which facts were proved by the son himself.

Erskine, for the Defendant, contended, That though the Defendant might have been liable in a civil action for all acts of his agents, it was otherwise where he was to answer criminally. That though the proving him to be the proprietor of the paper might, *prima facie*, subject him criminally, it was otherwise where it was clearly shewn that the fact of the publication was not his, nor done with his privity; that *actus non facit reum nisi sit mens rea*, so that if the act of publication, which constituted the crime, was proved to be that of another, the jury would be bound to acquit the Defendant.

Lord Kenyon taid, he was clearly of opinion, that the proprietor of a newspaper was answerable criminally, as well as civilly, for the acts of his servants or agents, for misconduct in the conducting

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of a newspaper. That this was not his opinion only, but that of Lord *Hale*, Justice *Powell*, and Mr. Justice *Foster*; all high law authorities, and to which he subscribed. This was the old and received law for above a century; and was not to be broken in upon by any new doctrine upon libels.

The Defendant was found guilty,

Law, *Adam*, and *Cowper* for the prosecution.

Erskine for the Defendant.

CUTHBERT *et alt.* v. HALEY.

If a party who is liable on bills of exchange or other security, on which usurious interest has been taken, on being called upon for payment of the bills or securities by a *bona fide* holder, agrees to give a bond for the amount of these bills, it is a good and legal security, and the obligee cannot set up the usury in the bills as a defence to the bond. *Aliter* of a *particeps criminis*, who holds bills or notes usuriously taken; he cannot by the substitution of another security recover the amount of the bills or notes.

DEBT on bond.

The Defendant pleaded, that the bond was given by the Defendant for securing money, lent by one *Planck*, to him; upon which loan it was corruptly, and against the form of the statute, agreed, that the Defendant should pay for the forbearance above five per cent. &c.

The Plaintiffs replied, that the bond was given for a good and lawful debt, and traversed the usury and issue thereon.

The Plaintiffs were bankers. *Planck* was a gold-beater in Long Acre, and kept cash at the house of the Plaintiff's.—*Planck* was largely concerned in discounting bills of exchange, and had discounted for the Defendant bills to the amount of 1344*l.* 2s. upon which he took usurious interest

Planck, in the usual course of business, paid those bills into his banker's (the Plaintiffs) who credited him

him to their amount, and who had no manner of knowledge of his transactions with the Defendant.

When the bills became payable, payment was demanded of the Defendant; who not being then able to pay them, the Plaintiffs took his bond for 1340*l.* and paid them the difference in cash.

These facts being disclosed at the trial, the Plaintiff's counsel contended, that they did not amount to usury.

For the Defendant it was insisted, that the notes having been obtained from the Defendant on a usurious transaction, and the bond given in consideration of the notes, that the illegality of the notes was communicated to the bond, and vitiated it in point of law; and *Tate* v. *Wellings*, 3 T. Rep. 537, was relied on.

Lord KENYON said, that whatever might have been the case between the Defendant and *Planck*, had the bond been given to *Planck;* and however the illegality of the consideration might in such case have vitiated the bond, he was clearly of opinion that it could not have that effect here. It was admitted, that the Plaintiffs were not concerned in or conusant of the dealings between the Defendant and *Planck;* they gave the value of these notes to *Planck;* and the bond was given to secure that value by the Defendant, whose notes they were. It would be of very serious consequences, if securities given at a great length of time preceding, on a good consideration, should be declared void, by reason of some part of the consideration being tainted with usury, between persons not parties in

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the securities. If a party in possession of a security usuriously obtained, prevailed on that party to substitute a different security, that should not make the latter good, because the substitution was made to one who was party to the usury; but in this case, the security was given to one not a *particeps criminis*, but to one who came fairly by the notes, and gave for them a good consideration. He was therefore of opinion the Plaintiff was entitled to recover.

Verdict for the Plaintiff.

Erskine, *Gibbs*, and *Reader* for the Plaintiff.

Mingay, *Marryatt*, and *Lawes* for the Defendant.

In the next term, the Defendant's Counsel, with the consent of the Lord Chief Justice, took the opinion of the court on the point; and the rest of the Judges unanimously agreed with Lord KENYON, and gave judgment for the plaintiff.

Vide *Ellis* v. *Warnes*. *Moor*, 752, and Cro. Car. 33, 5 C. *Roberts* v. *Tremayne*, Cro. Jac. 508, and *Lowe* v. *Waller*, Doug. 736.

RAVEN *et alt.* *v.* DUNNING *et* CHILTON.

June 28th.

Where one of the Defendants in a joint action pleads bankruptcy, that does not make him admissible as a witness.

THIS was an action on the case, on a special agreement.

The declaration stated, "That in consideration that the Plaintiff would ship and deliver to certain persons, carrying on trade by the name of *Sherraton* and *Chilton*, twelve puncheons of rum, the Defendants undertook to re-deliver value, &c. and breach assigned in not delivering," &c.

Dunning the Defendant, pleaded, *Non assumpsit.*

Chilton the other Defendant, pleaded *Bankruptcy.*

The question in the case was, Whether the goods for which the action was brought, had been sold and delivered to *Sherraton* only, or to *Sherraton* and *Chilton*, who carried on the business jointly, of spirit merchants at *Sunderland?*

To prove that the goods had been sold to *Sherraton* only, *Law*, for the Defendant, proposed to call *Chilton*, one of the Defendants on the record.

His admissibility was opposed by the Plaintiff's counsel.

Law contended, That he having pleaded bankruptcy, was entitled to his discharge from the present demand, by virtue of his certificate, and was there-

therefore uninterested in the event of the action. He compared it to the case of an action of trespass against several, where one of the Defendants, against whom the plaintiff offered no evidence, might be called as a witness for the other Defendants. He added, that he had releases from the witness to the assignees, and from *Dunning*, the other Defendant, to him.

Erskine, for the Plaintiff. The witness stands a Defendant on the record, and liable to the costs of the action. It is contended, that he is a competent witness, because he has obtained his certificate. Can the Plaintiffs be bound by the mere production of the certificate? It may be procured by fraud: it may be void, because the bankrupt may have lost money at play. In the case put of the Defendant in trespass, who is admitted as a witness for the other Defendants, he is acquitted by the verdict of the jury: till then he is not admissible. In this case there is no acquittal by the verdict of a jury. The witness is therefore not admissible.

Lord KENYON. I adopt the answer given by Mr. *Erskine.* This witness is not admissible, nor can he be made so by the mode proposed. He is liable to the costs of this action in case of a verdict for the Plaintiff; that is, an interest from whence he cannot be discharged.

His Lordship rejected him; and the Plaintiff had a verdict.

Erskine, Gibbs, and *Park* for the Plaintiff.

Law and *Giles* for the Defendant.

Vide *Ward* v. *Hayden et ventom,* ante 552.

JAMES

JAMES *v.* JONES, *et alt.*

July 3.

CASE against the Defendants, as owners of a ship called the *Seaflower*, for not delivering goods shipped on board that vessel by the Plaintiff.

It turned out, however, in evidence, that though the Defendants were the owners of the ship, she had, in fact, been chartered for that voyage by them, to two persons of the name of *Reed* and *Parkinson*.

Upon this evidence. Lord KENYON nonsuited the Plaintiff, holding,—As no express contract was proved with the Defendants, that *Reed* and *Parkinson* were for that voyage to be deemed as the owners, and the Captain as their agent *pro hac vice*, the liability being shifted by the charter-party from one party to the other.

Erskine and *Park* for the Plaintiff.

Garrow and *Gibbs* for the Defendant.

END OF TRINITY TERM.

CASES

CASES

ARGUED AND RULED

ON

THE HOME CIRCUIT.

SUMMER ASSIZES, 1799,
AT HERTFORD,
CORAM MR JUSTICE BULLER.

The KING v. KELLY, CROSBY, and BURKE.

Monday, July 9th.

In an indictment, charging the prisoner with uttering false coin, and with having other counterfeit money in his possession, the fact of uttering should be distinctly charged in the count for the latter offence, and not with reference to another count.

THIS was an indictment against three Defendants. The first count charged, that the Defendants made and counterfeited one piece of counterfeit money to the likeness of a shilling, and uttered the same to one *Mary Inglethorp*, &c. The second count was in terms the same, only charging the uttering to be to one *Watts*. The third count charged, that the Defendants when they so *uttered the said last-mentioned piece of false and counterfeit money*, had about them, in their custody and possession, one other piece of false and counterfeit money, knowing the same to be false and counterfeit.

Upon this indictment being opened, *Buller*, Justice, ruled, That the prosecutor could go on the first or second counts of the indictment, for uttering only: That, in order to convict on the aggravated charge in the third count, it was necessary that the fact of uttering

uttering should be distinctly charged in the same count in which it was charged that the Defendants had other counterfeit money about them at the time; which in the present count was not the case, there being in it no distinct charge of uttering, but by reference to the precedent counts.

The jury found two of the prisoners guilty, and the verdict was taken on the second count.

The Common Serjeant *Silvester*, and *Fielding*, for the prosecution*.

SUMMER ASSIZES, 1799.
AT CHELMSFORD.
CORAM MR. JUSTICE BUTLER.

SCAMMEL, q. t. *v.* WILLET, Clerk.

Wednesday, July 9th.

To debt against the incumbent of a parish for non-residence, it is a good defence that, from the unhealthfulness of the living, he cannot reside there, but at the risque of life.

DEBT on the statute 21 *Hen.* VIII. ch. 13, for non-residence.

The Defendant was the rector of *Stanford le Hope*, in the county of *Essex*.

The Plaintiff, after proving that fact, then gave in evidence, that for the twenty years last past, the Defendant had not resided on his benefice.

The defence relied upon was, that the Defendant after having been presented to the living, went to reside there, and was soon after attacked with an ague: that the violence of the distemper had brought on a

* Though the point ruled in this case is not properly a *Nisi Prius* point, I have, however, thought it worth inserting.

fever,

fever, which had totally destroyed his health. These facts were proved; and it was further given in evidence, by his physician, that his present state of health was such, that to reside on his living, would probably be attended with the most serious and dangerous consequences.

This was relied on by the Defendant's counsel, as amounting to a good defence in point of law.

Shepherd, Serj. for the Plaintiff, admitted that sickness, or want of health, was a sufficient excuse for a temporary absence of the incumbent from his living; but for a temporary absence only: that if his state of health was such as to incapacitate him totally from attending to the duties of his function, he ought to exchange his preferment, or totally retire from a situation, the important duties of which he was incapable of performing: and he said, that a case to that effect had been so lately decided in the court of King's Bench.

Buller, Justice. I know of no law that says so; and I take the law to be precisely the other way. Sickness is a sufficient excuse for a temporary absence, and it is so held in *Coke's* Reports; and there is no reason why it should not be so, where the illness, or total want of health in the incumbent is such, that he cannot reside on his living but at the risque of life. I am of opinion that it is a sufficient excuse; and as I know of no decision of the Court of King's Bench holding the contrary, I shall rule it so.

The Plaintiff was nonsuited.

Shepherd, Serj. and *R. Jackson* for the Plaintiff.
Garrow for the Defendant.

SAME

SAME ASSIZES.

Moyes *v.* Willet, Clerk.

An action on the case will not lie against the parson for not taking away his tithes, unless they have been properly set out. It is therefore not maintainable for not taking away tithe of hay, where it was set out in the swath.

This was an action on the case, against the Defendant, as rector of the parish of *Stanford le Hope*, in the county of *Essex*, for not taking away his tithes.

The Plaintiff was a farmer in that parish, of which the Defendant was the incumbent; and it was proved, that when the grass was cut, he had set out the tithe in the swath.

Buller, Justice, ruled, that the Plaintiff could not recover: that before the Plaintiff could entitle himself to damages for not taking away the tithes, it should appear that they were properly set out, and in a fit state for the parson to take them; that by a late determination of the Court of Exchequer, the tithe of hay was not to be set out in the swath, but in the cock; and that as the plaintiff had not set out his tithe in a pròper manner, the parson was not bound so to take it; and the action was therefore not maintainable.

The plaintiff was nonsuited.

Shepherd, Serj. and *R. Jackson* for the Plaintiff.

Garrow for the Defendant.

CASES

ARGUED AND RULED

AT NISI PRIUS

MICHAELMAS TERM, 40 GEO. III.

IN THE COMMON PLEAS.

FIRST SITTING IN TERM.

JOHNSON v. EVANS, Clerk.

No action is maintainable for words spoken by a party in giving charge of another to an officer, or in preferring a complaint before a agistrate.

THIS was an action of slander. The words were, "She is a thief; and tried to rob me of part of her wages."

The Defendant pleaded, 1st, Not Guilty; 2d, A justification of the truth of the words.

The Plaintiff had been servant to the Defendant. Upon a dispute taking place, he discharged her; and some difference arising respecting the payment of her wages, he charged her with having attempted to cheat him respecting her wages, and used the words as laid; but the Plaintiff failed in proving them to have been spoken at that time.

Having however sent for a constable, in order to take her into custody, he made use of the same words

words to the constable when he came, to whom he meant to have given her in charge; but which in fact he did not do.

To prove the words, the Plaintiff's counsel then called the constable.

He proved the words spoken; but it further appeared, in the course of his evidence, that the words had been spoken by the Defendant, addressed to him in his character of constable, and in the course of the charge and complaint which the Defendant made to him against the Plaintiff.

Lord ELDON, Chief Justice, said, that the evidence given of the speaking of the words laid in the declaration, was not such as he should direct the jury to find a verdict for the Plaintiff. Words used in the course of legal or judicial proceeding, however hard they might bear on the party of whom they were used, were not such as would support an action for slander. In this case, they were spoken by the Defendant, under a belief of the fact, and when he was about to proceed legally to punish it. It would be a matter of public inconvenience, and operate to deter persons from preferring their complaints against offenders, if words spoken in the course of their giving charge of them, or preferring their complaint, should be deemed actionable.

The Plaintiff should be called.

Cockell, Serj. and *'Espinasse* for the Plaintiff.

Shepherd, Serj. and *Lens*, Serj. for the Defendant.

SECOND SITTING AT WESTMINSTER,

IN THE KING'S BENCH.

Nov. 14.

JACKSON v. BURLEIGH.

To maintain an action for maliciously holding, when less than 10*l.* was due, cannot be sustained, unless it is in proof that the Plaintiff knew the fact to be so. It is not sufficient that in the action less than 10*l.* was paid into court, which the Plaintiff took out and proceeded no farther in the action.

CASE for maliciously arresting the Plaintiff, and holding him to bail, without any cause of action, to the amount of 10*l.*

Plea,—Not guilty.

The Plaintiff's case, as stated by his counsel, was, that the Plaintiff, who was a liquor-merchant at *Cambridge*, having employed the Defendant, who was a carrier, in the way of his business, and there being accounts depending between them, they had come to a settlement; on which a balance of 9*l.* 6*s.* only was in favour of the Defendant, who, notwithstanding, had arrested and held him to bail for 10*l.* and upwards. He further stated, in corroboration of the above facts, that the Defendant having proceeded in the action, in which he had arrested the Plaintiff, the latter paid 9*l.* 6*s.* into court; which the Defendant took out of court, and proceeded no further in the action.

In proving this case, the Plaintiff's counsel gave in evidence the affidavit to hold to bail; he then produced the writ, which was indorsed to hold to bail for 10*l.* and upwards, directed to the sheriff of *Cambridge*.

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The witness who produced the writ, was asked where he had got it: he said, it had been sent up to him in a letter. *Law* objected to its being read.

Lord KENYON said, that under such circumstances, it could not be received in evidence.

The Plaintiff's counsel then called the bailiff, by whom the arrest had been made: he produced his warrant from the sheriff of *Cambridge*, under which the Plaintiff had been arrested.

Lord KENYON then said, he thought the writ might be given in evidence by producing it, the Plaintiff having proved an affidavit to hold to bail, and a warrant founded on the writ. It was accordingly received.

To prove that only the sum of 9*l.* 6*s.* was due from the Plaintiff to the Defendant, a witness was called, who was present when the Plaintiff and Defendant settled their accounts. He said, that upon that settlement the Plaintiff made up the account, by which he made out that he was then debtor to the Defendant on that balance of accounts, in 9*l.* 6*s.* only.

He was asked, if the Defendant acquiesced in the account so stated, and admitted the balance to be so; he said not: that the Defendant claimed a balance as due to him of 25*l.*

Lord KENYON said, that the ground of the action failed, and that the Plaintiff should be nonsuited. The complaint was for maliciously holding him to bail, when such a sum of money was not due as entitled the Defendant by law to hold him to bail. If the Defendant acted under the impression of a

mistake, in believing more than 10*l.* to be due, and under that belief held him to bail, he had a probable cause, and was warranted in that proceeding: the Plaintiff felt the necessity of proving that the arrest was made with full knowledge that the debt was under 10*l.*; but he had failed in proving it. The calculation was not acquiesced in by the Defendant, who claimed a balance of 25*l.* and therefore might well suppose that more than 10*l.* was due.

The Plaintiff was nonsuited.

Erskine and *Pell* for the Plaintiff.

Law and *Lawes* for the Defendant.

IN THE COMMON PLEAS,
WESTMINSTER,
THIRD SITTINGS IN TERM.

Nov. 21.

BERGSTROM *v.* MILLS.

If a ship is captured in the course of her voyage, and is afterwards recaptured and arrives at her port of destination, the sailors are entitled to their wages.

ASSUMPSIT by the Plaintiff, for wages due to him as a sailor on board the ship *Brazilla*; of which the Defendant was the owner.

Plea of *Non-assumpsit.*

The case on the part of the Plaintiff was this:— He was a native of *Sweden*, and engaged as a sailor on board the *Brazilla*, a transport in the service of government, bound to *Martinique*. In the course of the voyage, the vessel was taken by a *French* privateer: she was afterwards retaken by the *Alfred* man

man of war, and carried into *Martinique*, which was her port of destination, where she discharged her cargo.

The defence was, 1st, That the voyage was not performed:—2dly, That after the Plaintiff, and the other seamen of the *Brazilla*, had been taken on board the privateer, they had been invited by the officer of the privateer to enter on board her, by an offer of prize-money, not merely of subsequent captures, but of the *Brazilla* herself; which offer had been accepted by the Plaintiff and another *Swede*, who was a mariner on board the *Brazilla*; and that they had entered and done duty on board the privateer, as part of her crew.

This was however denied by all the witnessess called for the Plaintiff.

Lord ELDON. There is no doubt, that if a ship does not perform her voyage, the sailors have no title to wages: the policy of the law has said so, as the means of making it the interest of the sailors to preserve the ship; but it is equally certain, that if the voyage is performed, a temporary interruption shall not defeat the claims of the seamen. The first point made here is, that the voyage has not been performed. I am of opinion that it has been sufficiently performed as to the service, to entitle the Plaintiff to recover, unless he is prevented by the law arising out of the second point made by the Defendant's counsel. It is in evidence, that the ship ultimately arrived at *Martinique*, the port of her destination; she was on her arrival entitled to Freight: Freight is the mother of Wages; salvage was due to the

King's

King's ship by which she was recaptured; but with that deduction she was entitled to receive her freight; and probably has received it.

If a foreign seaman, captured on board an English ship, enters into the service of the enemy, though the ship is afterwards recaptured and completes her voyage, he shall not be entitled to wages.

The second point is a new one:—Whether a foreign seaman, captured on board an *English* ship, who is taken on board the enemy's ship, and voluntarily enters on board her, and becomes a part of her crew, thereby forfeits his claim to wages on board the *English* ship? The strong inclination of my opinion upon that point is, that it is a forfeiture. Upon this point, however, there is contradictory evidence: that, the jury are to decide; and if they think the Plaintiff did enter on board the privateer, and serve as part of her crew, I recommend it to them to find for the Defendant, and to leave it to the Plaintiff to move for a new trial.

The jury found a verdict for the Plaintiff.

Cockell, Serjt. and *'Espinasse* for the Plaintiff.

Shepherd, Serjt. for the Defendant.

SITTINGS AFTER TERM AT WESTMINSTER.

Dec. 3.

HABERSHON *v.* TROBY.

Where a cause has been referred, and the arbitrator, upon inspection of the Plaintiff's own books, and examination of the parties, finds that the Plaintiff had no cause of action, in an action for malicious prosecution, the arbitrator cannot be called as a witness to prove those facts.

CASE for maliciously holding the Plaintiff to bail.

The circumstances of the case were these:

The present Defendant, who was a silversmith, had brought an action against the Plaintiff, who had been his servant, for money had and received, and had in that suit arrested and held him to bail.

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The cause came on to be tried at the first sitting in the present term, when the present Plaintiff offered to suffer a verdict to go against him, provided the present Defendant would produce his books before an arbitrator, and it did not appear by his own checks and entries, that the whole money for which he then sued the Plaintiff, had not been accounted for. A verdict was accordingly taken by consent for the Plaintiff (the present Defendant) and the cause referred, with power, for the arbitrator to examine the parties themselves upon oath, and compel a production of the books referred to.

The arbitrator having examined the books, and the parties themselves on oath, awarded in favour of the present Plaintiff, that there was no cause of action against him, and that nothing was due from him to the present Defendant.

Upon these circumstances the present action was founded, and notice given to produce the books.

Erskine for the Plaintiff, now called for the books; and proposed to examine the arbitrator as to the facts which appeared before him.

This was opposed by the Defendant's counsel.

Per Lord KENYON. I don't think I ought to admit this evidence. It seems to me, that the arbitrator ought not to be permitted to depose here as to what transpired before him, either upon the examination of the parties themselves, or on an inspection of the Plaintiff's books: upon the principle, that the parties themselves could not have been examined in the former cause, nor could the Plaintiff be compelled by a Judge at *Nisi Prius* to

produce his books; and it would be a dangerous thing if such evidence were admitted to prove the arrest in that cause to be malicious, as the arbitrator might have proceeded to cut the knot rather than to unloose it, according to the strict rules of law, from a wish to do complete justice between the parties.

The parties consented to withdraw a *juror*.

Erskine, *Mingay*, *Barrow*, and *Robinson* for the Plaintiff.

Garrow for the Defendant.

Davis *v.* Trotter, Esq. Sheriff of Surry.

Where a bankrupt has surrendered within the forty-two days under his commission, and has submitted to his last examination, the commissioners by their own authority may enlarge the time for completing his last examination; and he is protected thereby from arrests during that interval.

This was an action against the Defendant, as sheriff of *Surry*, for an escape.

The person for the escape of whom the action was brought, was a bankrupt: he had surrendered under his commission at the end of the forty-two days: his last examination being not then concluded, the commissioners made an order for enlarging the time for his last examination till a further day, for which they gave him a summons, and indorsed it, as the order for his attendance on that day, and as his protection during the intervening time.

During that interval he was arrested by an officer of the sheriff of *Surry*, at the suit of the Plaintiff. He produced the summons from the commissioners for his enlarged time; and the officer on the produc-

tion

tion of it discharged him. Upon that discharge the present action was founded, as being an escape.

Erskine for the Plaintiff, contended, that the commissioners of bankrupt had no power to enlarge the time for a bankrupt to complete his examination, under the statute 5 *Geo.* II. ch. 30; but were confined to the forty-two days mentioned in it; and that if further time was necessary, it must be done by application to the Lord Chancellor, and by procuring an order on petition for that purpose.

Lord KENYON ruled, that as the bankrupt had surrendered under his commission, within the forty-two days appointed for his last examination, it was clearly in the power of the commissioners to enlarge the time for him to complete his examination, and in their power to protect him during that interval; but that had he never surrendered under his commission, that then an enlargement of the time must be by order of the great seal. His Lordship, however, allowed the Plaintiff to take a verdict for one shilling with liberty for the Defendant to move to set the nonsuit aside.

Erskine and *Lawes* for the Plaintiff.

Garrow and *Marryatt* for the Defendant.

In the next term, the Defendant's counsel moved accordingly; and relied on *Perrot's* case, 2 *Burr.* as deciding the right of the commissioners to enlarge the time for the bankrupt's final examination.

The court concurred in opinion with Lord KENYON, and ordered a nonsuit to be entered.

SITTINGS

SITTINGS AFTER TERM
IN THE COMMON PLEAS,
AT WESTMINSTER.

SUTHERLAND v. LISHNAN.

Where parties contract by deed, but the Defendant does not execute it, the Plaintiff may sue in assumpsit, notwithstanding the deed.

ASSUMPSIT for seamen's wages.

The Plaintiff was mate of the ship of which the Defendant was the captain.

The Plaintiff proved the hiring by the Defendant of him, in the capacity of mate, and his service during the voyage.

The Defendant's Counsel produced the ship's articles; these were under seal, and the Plaintiff had signed and sealed them; but they were not executed by the Defendant. They contended, that the action was misconceived, and ought to be covenant, the articles being under seal.

Lord ELDON ruled, that the binding by deed ought to be mutual, to make it necessary for the Plaintiff to sue in covenant; that the Defendant never having sealed the articles, could not be sued in that form of action; and that the present action was not rightly brought.

The Defendant had a verdict.

Cockell, Serj. and *Espinasse* for the Plaintiff.

Shepherd, Serjeant, and *Taddy* for the Defendant.

Rodgers v. Lacy.

Dec. 6.

Where, under the act for regulating seamens wages in the West India trade, a licence is obtained by the captain to give an advance of wages, the licence must specify the amount of the wages permitted to be given.

This was an action of assumpsit by the Plaintiff, to recover his wages, as a sailor on board the ship *Suffolk*, of which the Defendant was the captain.

The Plaintiff proved, that the Defendant's ship being at *Savannah la Mer*, in the island of *Jamaica*, and much in want of hands, had engaged the Plaintiff, and five others, at forty-five guineas bounty, and 9*l*. per month wages: that the Plaintiff served during the voyage: that the Defendant paid him the forty-five guineas, but refused to pay him the monthly wages.

The Plaintiff's witnesses further proved, that at the time the Defendant hired the Plaintiff and the other seamen, he said, that he was enabled to give them such large wages, as he had a licence under the act of parliament from Mr. *Murray*, who was *custos rotulorum* at *Savannah la Mer*.

By the stat. 37 *Geo.* III. ch. 73, it is enacted, "That no master of any merchant ship, which shall "sail from any port or place in *Great Britain*, shall "hire, or engage to serve, any seaman, or mariner, "in any of his Majesty's colonies in the *West Indies*, "at or for greater or more wages than according to "the rate of double the monthly wages contracted "for with seamen in the same station, hired or en- "ganed to serve on board such ship at the time of "her last departure from *Great Britain*, unless the "governor, chief magistrate, collector, or comp- "troller of such port shall think that greater, or "more

"more wages than double the monthly wages aforesaid, should and ought to be given to such seaman or mariner; and do and shall authorize, or direct the same to be given by writing under his hand; and then, and in such case, the master or commander of such vessel, shall and may be at liberty to pay, and the seamen to take and receive such greater or higher wages as the governor, chief magistrate, collector, or comptroller shall direct, as aforesaid."

The Plaintiff having procured a copy of the licence so given to the Defendant by the officer in *Jamaica*, the same was given in evidence, and was in the following words:—

"*Jamaica, Parish of Westmoreland.*

"Whereas it appears to me, the Hon. *George Murray*, Esq. *custos rotulorum*, and chief magistrate of the parish of *Westmoreland*, by the oath of *Lawrence Lacy*, master of the ship *Suffolk*, and lying at anchor in the port of *Savannah la Mer*, in the said parish, and bound from thence to the port of *London*, in the kingdom of *Great Britain*, that he cannot engage seamen to carry his said ship home at the rate allowed by the law: these are therefore to licence and permit the said *Lawrence Lacy* to procure men on such terms as he can, to navigate his said ship, now loaded and ready to depart with convoy for *Great Britain*.

"Witness my hand,

"At *Savannah la Mer*, "*G. Murray*."
April 24th, 1799.

The

The counsel for the Defendant contended, That the Plaintiff could not recover: that the captain was only authorised to give wages beyond the double wages given on the outward bound voyage by virtue of a licence; which licence ought to be exactly conformable to the act of parliament: that the licence required by the statute, should specify what wages should be given; whereas the licence produced, contained no restriction, but left the master at liberty to give wages to what extent he pleased.

It was answered by the Plaintiff's counsel, that the statute having meant to exercise a controul over the giving of exorbitant wages, by certain regulations, intended, in particular cases, to dispense with them by means of a licence; but that it never could be the intention of the legislature to impose any limit on the wages to be given, where a licence was granted; as it might happen that no men could be procured at the sum the governor or other officer might so limit; though they might be got at different rates of wages.

Lord ELDON said, he was of opinion, the Plaintiff was not entitled to recover; the licence not being conformable to the act of parliament. By looking to the policy of the act, it would appear, that as, on the one hand, sailors had exacted on the captains of *British West India* ships, by demanding exorbitant wages, so the captains themselves had been guilty of dishonesty and fraud, by endeavouring to seduce the seamen from other ships in the same trade by the offer of higher wages; that the act of parliament meant to prevent both parties from treating, and to lodge the discretion in those who had

no

no interest between them; that was in the chief magistrate of the island at which the ship was: that that discretion required him to settle the rate of wages. The words of the statute were, "That the master shall be at liberty to give such wages as the magistrate should direct." Those words must refer to an antecedent settlement of the wages. His Lordship added, I am therefore of opinion, that the statute requires such a licence to ascertain what wages shall be given; and this not being in that form, the wages cannot be recovered.

The Plaintiff was nonsuited, with liberty to move to set the nonsuit aside if the court should differ in opinion with his Lordship on the construction of the clause in the act.

Cockell, Serj. and '*Espinasse* for the Plaintiff.

Shepherd, Serj. and *Runnington*, Serjeant, for the Defendant.

In the next term, a new trial was moved for on the part of the Plaintiff; but the court of Common Pleas concurred in opinion with the Lord Chief Justice. 1 *Bos.* v. *Pull.* Reports, *C. P.*

Same day.

SMITH *v.* KNOX.

It is no defence to an action by a *bona fide* holder of a bill, that the bill was an accommodation one, and that known to the holder.

ASSUMPSIT, on a bill of exchange by the Plaintiff as the indorsee of one *Vertaul.*

The bill was drawn by *Vertaul*, in his own favour, on the Defendant, who accepted it, and indorsed by *Vertaul* to the Plaintiff.

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The Plaintiff proved the hands-writing of the several parties to the bill, and there rested his case.

Marshall, Serj. for the Defendant, stated, That he rested his defence upon two points; 1st. That the bill in question was drawn upon the Defendant by *Vertaul*, and accepted without any consideration; 2dly, That the Plaintiff had sued *Vertaul*, and taken from him a warrant of attorney for the amount of the bill.

Lord Eldon. As to the first point, If a person gives a bill of exchange for a particular purpose, and that is known to the party who takes the bill; as for example, if to answer a particular demand, then the party taking the bill, cannot apply it to a different purpose; but where a bill is given under no such restriction, but given merely for the accommodation of the drawer or payee, and that is sent into the world, it is no answer to an action brought on that bill, that the Defendant, the acceptor, accepted it for the accommodation of the drawer, and that that fact was known to the holder; in such case, the holder, if he gave a *bona fide* consideration for it, is entitled to recover the amount, though he had full knowledge of the transaction.

As to the second point, the several parties on a bill are chargeable in different order: the acceptor is first liable, and the indorsees in the order in which they stand on the bill; but the suing, or taking a security from one of the parties liable, shall not discharge another who is liable prior to him in point of order. In this case, the Defendant relies on the discharge of the drawer; the holder has a right to have recourse to all the parties on the bill; and a secu-

The holder of a bill of exchange may give a discharge to a party on it, which shall not discharge one liable prior to him. *Aliter*, if the discharge is given to one subsequently liable. Vid. post, *English* v. *Darley*.

security given by the drawer cannot discharge the acceptor, who is liable prior to him.

It is said, that the holder may discharge any of the indorsers after taking them in execution, and yet have recourse to the others. I doubt of the law as stated so generally; I am disposed to be of opinion, that if the holder discharge a prior indorser, he would find it difficult to recover against a subsequent one; but in the present case, the discharge of the drawer, by taking his warrant of attorney, is no legal discharge to the acceptor.

Verdict for the Plaintiff.

Vaughan, Serj. and *'Espinasse* for the Plaintiff.

Marshall, Serjeant, for the Defendant.

ADAMS *v.* DAVIS.

A journeyman, by whom goods have been delivered, is a good witness to prove the delivery, without a release: *aliter*, if it was proved to be customary to pay him for them.

ASSUMPSIT, to recover the amount of a baker's bill.

Plea, *Non-assumpsit.*

The Plaintiff called several witnesses, who had been his journeymen while the bread had been furnished, and who proved the delivery of it at different times.

Clayton, Serjeant, for the Defendant, objected: that the witnesses ought to have been released; that the Defendant might have paid the journeymen, and they have not accounted for it to the master; that they would in such case be liable over to him; they ought

ought to be released, inasmuch as they were swearing to discharge themselves.

Lord *Eldon* said, witnesses of this description were always admitted from necessity; nor did he see how this case was to be distinguished from the common one. If there was evidence that the common usage of the business was for the journeymen to receive the money for the bread delivered, it might alter the case; but that not being the case, he was of opinion that a release was unnecessary.

The Defendant had a verdict.

Shepherd, Serjeant, and *Laws* for the Plaintiff.

Marshall, Serjeant, and *Clayton*, Serjeant, for the Defendant.

English *v.* Darley.

If the holder of a bill of exchange accept of a security from, or give time to a party on the bill, it is a discharge to a party liable, subsequent to him in order, but not to one liable prior to him in point of order.

Assumpsit by the Plaintiff, as indorsee of a bill of exchange against the Defendant, as the indorser.

The Plaintiff proved the hand-writing of the Defendant, and notice of non-payment by the acceptor; and there rested his case.

The defence relied upon on the part of the Defendant, and which he gave in evidence was, that the Plaintiff having commenced actions against the acceptor and himself, had obtained a judgement against the acceptor, and sued out execution against him: that a compromise had afterwards

taken place between them, and he had accepted 100*l.* in part discharge, and taken a bond and warrant of attorney for payment of the remainder, by installments. This, his counsel contended, was a discharge in point of law.

The Plaintiff's counsel contended, that the holder having a right to sue all the parties, was not deprived of his remedy against any of them until actual payment, where he had proceeded at law against all, and there was no laches; and relied on *Hayling* v. *Mulhall*, 2 *Black.* Rep. 1235; and *Macdonald* v. *Bovington*, 4 Term Rep. 825.

Lord ELDON. I am of opinion, that the Plaintiff, by the agreement with the acceptor, and the taking a new security from him, has discharged the Defendant; and that the present action cannot be supported. It is true, the holder of a bill of exchange has his remedy against all the parties on a bill; but the holder has it not in his power to give time to a party on the bill first liable, and afterwards to proceed against another: the holder may give time to his immediate indorser; he may discharge him out of custody, at the same time that he is proceeding to execution against a prior indorser to him, or against the drawer or acceptor; but he cannot give time to or discharge the drawer or acceptor, and afterwards proceed against that indorser. Suppose the holder, a second indorsee, should give time to the payee, the first indorser, and take his warrant of attorney, payable at a future time, could he proceed, and take out immediate execution against his immediate indorser? I think not; for if *that* indorser

dorser paid the money, he would have a right to resort immediately to *his indorser*; that is, to the payee who had before had time from the holder: this is inconsistent. I recollect a case in the bankruptcy, I think, of *Lewis* and *Potter*, where the holder of a bill having entered into a composition with the acceptor, and afterwards proved the amount of the bill under the indorser's estate, the Chancellor, on a petition, ordered the debt to be expunged. I am of the same opinion; and as the Plaintiff, in this case, has accepted a security from the acceptor, he has, in my opinion, discharged the Defendant the indorser; and must be nonsuited.

Cockell, Serjeant, and *Best* for the Plaintiff.

Shepherd, Serjeant, and *Lens*, Serjeant, for the Defendant.

Vide *Dyke* v. *Mercer*, 2 *Shower*, 394; *Walwyn* v. *St. Quintin*, 1 *Bos.* and *Pull.* 652.

In the next term the Plaintiff moved for a new trial; but the court concurred in opinion with Lord *Eldon*, and refused the rule.

KIDD v. RAWLINSON.

Where a party purchases goods from the sheriff, and takes a bill of sale of them, it differs from a bill voluntarily given by the debtor as a security; that the party need not take immediate possession under the former bill of sale, but must under the latter.

THIS was an action for money had and received.

Plea of *Non assumpsit*.

One *Abrun*, a publican being indebted to a judgment creditor, a *fieri fac.* was sued out against him, and the sheriff of *Surry* took his goods in execution under it. The Plaintiff *Kidd*, who was brother-in-law to *Abrun*, purchased the goods from the sheriff's broker and took a bill of sale of them, dated the 3d of *November*, 1798. The plaintiff did not take possession of the goods, but permitted *Abrun*, his wife and family, to remain in possession of them, in the house.

Abrun afterwards became indebted to the Defendant *Rawlinson*, by whom he was arrested, and put into prison. The debt was 14*l.*; and it was agreed, while *Abrun* was in prison, that *Rawlinson* should keep the house open and put in beer; for which it was calculated that an addition was to be made to *Abrun's* debt of 10*l.* and *Abrun* agreed to give a bill of sale, which was made out for 29*l.* being the debt and expences.

Rawlinson entered, and took possession, under his bill of sale: the plaintiff gave him a notice that the goods were his, under a fair purchase, and not to sell them.

The goods however were sold for 26*l.*; but half a year's rent being in arrear, for which the landlord distrained, amounting to 12*l.*, that sum was paid to him;

him; and the present action was brought to recover the remaining sum, arising from the sale of the goods.

The counsel for the Defendant, upon these facts, contended, that the Plaintiff ought to be nonsuited: that claiming title under a bill of sale, under which he had not taken possession, it should be deemed fraudulent, and the Plaintiff could made no title under it; and cited *Twine's* case, 3 *Co. Rep.* 80.

For the Plaintiff it was answered, that the bill of sale, under which the plaintiff claimed, was not a voluntary bill of sale, but a purchase from the sheriff; and that it was such property as gave him a title against all other persons claiming under *Abrun.*

Lord ELDON said, he was of opinion that the Plaintiff was entitled to recover. In the case of a voluntary bill of sale it had been decided, that it was void, unless the person claiming under such bill of sale took immediate possession; but that was the case as between debtor and creditor, where it was given by the former as a security to the latter: that was *Twine's* case. In the present case, the property was fully and fairly transferred to the Plaintiff, by the sale made by the sheriff. If, however, there was any fraud, as between *Abrun* and *Kidd,* that would vitiate the transaction: he would therefore, leave it to the jury to say, Whether it was a fair transaction, and the money *bona fide* advanced by *Kidd,* and the goods fairly transferred to him by the sheriff's bill of sale?

The jury found for the Plaintiff, that the transaction was *bona fide.*

 Shepherd,

Shepherd, Serjeant, and —— for the Plaintiff,
Marshall, Serj. and *Manley* for the Defendant.

2 Bos. and Pull. 59.

In the next term, the Defendant moved to have a nonsuit entered; but the Court of Common Pleas agreed in opinion with Lord ELDON, and refused the rule.

Vide *Edwards* v. *Harben*, 2 Term Rep. 587; and *Bull.* N. P. 258.

SITTINGS AFTER TERM AT GUILDHALL.

KUFH and others, *v.* WESTON and others

Dec. 9th, 1799.

Notice of the non-acceptance or non-payment of a bill of exchange, is sufficiently given, by proving that a letter was regularly put into the post, informing the party of the fact.

ASSUMPSIT, to recover the amount of a foreign bill of exchange drawn by one *Garde*, at *Exeter*, on Messrs. *Guetano*, *Drago*, and *Walsh*, at *Genoa*: the bill had been sent up to the Defendants, and they had sold it to the Plaintiffs in *London*.

The bill had been presented for acceptance at *Genoa*, and the acceptance refused. The defence was. That it had not been presented in a reasonable time, nor the protest for non-acceptance sent to this country as soon as it ought to have been; and that, therefore, the Defendants had not had due notice of its being dishonoured.

In answer to this, it was proved that the bill had been put into the post-office at *London*, the third day after

after it had been received from the Defendants, which was the first *Italian* post day after it had been so received. It was further proved, that from the disturbed state of *Italy* for some time before, the regular post had been interrupted, and the bill had not arrived at *Genoa* till a month after it became due; that it was immediately presented for acceptance; which being refused, it was protested, and the protest sent off immediately by the post to *England*.

A Mr. Keith, a partner in a mercantile house at *Genoa*, proved that letters which he had put into the post in this country, so far back as *February*, had not arrived at *Genoa* when the last mail which had arrived from that place had left it; and said, it was an extraordinary piece of good forune that the parties had had notice of the bills being dishonoured so soon, as from the distracted state of the country, he had been obliged to forward letters by many different conveyances out of the common course of the post.

Lord KENYON said, that the Defendants grounded their defence on the supposed *laches* of the Plaintiff; but he was of opinion that if the Plaintiffs had sent the bill by the ordinary course of the post, they had done all they were called upon to do; that they could not foresee that the post would be interrupted; and it could not be expected that they should send the bill by a special messenger, or any extraordinary mode of conveyance. His Lordship said, he therefore thought the Plaintiffs had been guilty of no *laches*, and were entitled to recover; and they accordingly had a verdict.

Erskine and *Vaillant* for the Plaintiff.

Gibbs and *Praed* for the Defendant.

Same day.

UNDERHILL v. WITTS.

Where a person is appointed constable, and he procures a deputy to serve for him, who is sworn in at the leet and approved of by the inhabitants, if he absconds and does not serve, the principal is nevertheless discharged.

THE declaration in this case stated, that the Defendant, being an inhabitant and resident within the ward of *Broad-Street*, had, at a wardmote, been chosen constable: that the Plaintiff was also an inhabitant and resident within the same ward; and that, in consideration that he would act as a substitute for the Defendant, he undertook to pay, &c. and the action was brought to recover the sum so promised to be paid for serving as such substitute.

Plea of the general issue, and notice of set-off.

To prove the Defendant having been elected constable, a clerk in the town-clerk's office was called, who produced a list of the persons sworn in to serve the office of constable, in which the Plaintiff's name was inserted, as having been sworn in as substitute for the Defendant to serve for that ward.

It was objected: that this was not the best evidence; and that the wardmote-book, containing an account of the election, should be produced; and it was admitted that this would have been necessary if the Defendant had not acknowledged himself to have been elected constable.

To this Lord KENYON assented.

In the course of the cause, it appeared that the Defendant had been held to bail before the year for which he had been elected constable was expired; and *Garrow*, counsel for the Defendant, observed, that the Plaintiff had been premature, as he had a right to retain the money till the service for which it was to be given, was performed; that the Plain-

tiff

tiff might have run away before the expiration of the year; and the Defendant might have been called upon to serve the office for remainder of the time.

Lord KENYON interrupted him, and said, that when a substitute was approved by the inhabitants, and sworn in at the leet, the liability of the principal was at an end; and that he could not afterwards be called upon to serve the office.

Upon the set-off, the Defendant had a verdict.

Mingay and *Peake* for the Plaintiff.

Garrow for the Defendant.

TRAPP *v.* SPEARMAN, Esq.

Same day.

To make a bill of exchange void for an alteration, it must be in a material part, as in the sum or date.

ASSUMPSIT on a bill of exchange, by the indorsee against the acceptor.

The defence attempted to be set up was that an alteration had been made in the bill after it was given. The alteration was, "when due, at the *Cross-keys, Blackfriars Road;*" which, *Erskine* contended, rendered the bill void.

Lord KENYON said, that this was not an alteration either in the time of payment, or in the sum; that to make a bill of exchange void, by reason of an alteration, it should be in a material part; though it had been formerly holden, that the even telling up a sum on a bill, or writing any thing upon it, would invalidate it, that strictness was now exploded: and as the alteration in the present case was not in a material part, but only pointing out the place where the bill was to be paid, it was not such an alteration as should invalidate the bill.

This

This being the only ground of defence, the Plaintiff had a verdict.

Garrow and *Giles* for the Plaintiff.

Erskine for the Defendant.

BOEHTLINCK *v.* SCHNEIDER, Assignee of CRANE, a Bankrupt.

To prove the laws of a foreign country, it must be done by documents properly, authenticated from that country; and cannot be proved by parol.

TROVER for a quantity of tallow.

The case in evidence was,—*Crane*, a merchant in *London*, by a letter dated *Sept.* 18, 1798, ordered the tallow from the Plaintiff, who resided in *Russia*. On the 11th of *October* following, twenty casks of it were shipped at *Cronstadt*, on board the *William*, Captain *Isherwood*, and the remainder the next day. The ship arrived in *London* in *December*. *Crane* committed an act of bankruptcy on the 16th of *October*.

On the ship's arrival in *London*, the cargo was claimed by the Plaintiff's agents, on the ground of a right to stop it *in transitu*, before it was delivered to the Defendant, who afterwards got possession of it.

The Defendants relied on their right to retain the possession of it, on the ground that the ship was chartered by *Crane*, and that a delivery on board the ſhip was a delivery to him; so that it could not be stopped *in transitu*.

The Plaintiff's counsel gave in evidence a letter dated the 19th of *October*, from the Plaintiff, requiring *Crane* to give security to their correspondent in *London* before the goods should be delivered.

Lord

If goods abroad are put on board a ship chartered by the consignee, the consignor cannot afterwards stop them *in transitu*.

Lord KENYON. The whole question is, Whether there was a delivery to *Crane* of the goods before this letter was written or not? Before the delivery, the party may annex any condition to it; but not after. If the ſhip was then chartered by *Crane*, it is a complete delivery of the goods to him; and there can be no stopping *in transitu*.

It being asked by one of the jury, Whether it made any difference that *Crane* had then committed an act of bankruptcy?

Lord KENYON said that it made none.

Law for the Plaintiff, stated that by the law of *Russia*, though the goods had been so delivered at *Cronstadt*, the shippers might stop them *in transitu;* and proposed to call a person conversant with the law of that country, to prove that the law was so.

Lord KENYON said, he could not admit such evidence of the law of a foreign country.

Law contended, that there was a difference between the written and the unwritten law of a country: that the former must be proved by production of such written law itself; but the unwritten law was matter of fact, and could only be proved by parol, by persons who were acquainted with it; and said that in a case of *Neville* v. *Gilchrist*, such evidence had been admitted.

Lord KENYON. Can the laws of a foreign country be proved by a person who may be casually picked up in the street? Can a court of justice receive such evidence of such a matter? I shall expect it to be made out to me, not by such loose evidence, but by proof from the country, whose laws you propose

pose to give in evidence, properly authenticated. In the case of *Morris*, who married the daughter of Lord *Baltimore*, in *Holstein*, the laws of that country respecting marriage were given in evidence, not by parol, but by documents properly authenticated. In the great case of the *St. Jago* prize-money, it was found to be necessary to send to *Spain* for an authenticated document of the laws of that country. Such proof, and so authenticated, I shall admit, as such only I hold to be legal.

His Lordship therefore rejected the evidence; and the Plaintiff was nonsuited.

Law and *Wood* for the Plaintiff.

Erskine and *Gibbs* for the Defendant.

In the next term the Plaintiff moved for a new trial, on the supposed admissibility of the testimony; but the Court of King's Bench concurred in opinion with his Lordship.

Dec. 13th.

BARBER *v.* GINGELL.

If the Defendant sets up as a defence to a bill of exchange, that it has been forged, and proves it to be so, it will be a good answer for the Plaintiff to shew that the Defendant had paid other bills of the same party under similar circumstances.

ASSUMPSIT on a bill of exchange for 240*l.*

Plea, *Non-assumpsit.*

The bill was drawn by *John Taylor*, in his own favour on the Defendant, and accepted by him, and indorsed by *Taylor* to the Plaintiff.

The defence was, 1st, That the acceptance of the bill was forged; 2dly, That after the bill became due, *Taylor*, the drawer, had paid 40*l.* in money, part of the bill, and given a bill for the remainder, which had been regularly paid.

To prove the acceptance, the Plaintiff called the notary's clerk. The bill was due the 4th of *August*

gust (*Sunday*): the clerk proved, that on the *Saturday* preceding, he had demanded payment of the bill of the Defendant at his house; that he did not look at the bill, but desired the clerk to call on the *Monday*, as he had then no effects.

The Plaintiff's counsel contended, That this evidence precluded the Defendant from going into the defence of forgery, as the Defendant had not denied his acceptance, but promised payment of the bill on the *Monday*, the Plaintiff being by that means prevented from seeking payment from the other parties on the bill, and in fact that it was an admission of his acceptance.

Lord KENYON was of opinion, that it did not shut out the defence of forgery, as the Defendant had not looked at the bill.

The Defendant proved the bill to be an actual forgery.

The Plaintiff then proved that the Defendant had been connected with *Taylor* in business: that he had in fact paid several bills drawn as the present by *Taylor*, and to which *Taylor* (as it was supposed) had written the acceptance in the Defendant's name.

Lord KENYON ruled, that that was an answer to the case of forgery set up by the Defendant; for though the Defendant might not have accepted the bill, he had adopted the acceptance, and made himself thereby liable to the payment of it.

The Defendant now proceeded to the defence, on the ground of the payment by *Taylor*.

To prove that fact, his counsel called *Taylor* the drawer.

He

He was at that time a prisoner in *Chelmsford* gaol, on a charge of forgery of the bill in question (among others) and brought up by *habeas corpus.*

A party in prison on a charge of forgery of a bill of exchange, is an admissible witness to prove payment of it on an action being brought to recover it.

The Plaintiff's counsel objected to his evidence. That the witness then stood in the situation of a person under a criminal charge for forgery of the bill in question: that it would be of great importance at the trial of the indictment to connect the witness with the bill in question: that if examined in chief by the Defendant's counsel, to prove the fact for which they proposed to call him, he must be subjected to the cross examination of them as the Plaintiff's counsel, which must either go to criminate him, or they would not have equal advantage with the Defendant's counsel, if the witness objected to the questions which had that tendency: that a similar rule had been laid down in the State Trials of *Hardy* and *Tooke:* and that, in Lord *Macclesfield*'s case, when the question was asked of a master in chancery, What was the highest price ever paid for the place of a master? the question was overruled, and held that it could not be asked.

It was answered by the Defendant's counsel, that it never had been thought of as an objection to a witness, that one party should be deprived of the benefit of a witness's testimony, because he might object to some of the questions put to him on his cross-examination: that the answers to the questions which they proposed to put, could not affect the witness, whether the acceptance was forged or not; as the only fact they wanted to ascertain by his testimony was, Whether the bill had been paid or not?

Lord KENYON said, he thought he ought not to reject a witness, because on his cross-examination a question might be asked, by which he might be affected; nor ought he to prevent a party from having the benefit of his testimony. That the object for which he was called was a collateral matter, and not imputing any criminality; and that he should prevent a witness standing in the circumstances of the present from criminating himself. The rule as stated to be laid down from the State Trials, appeared to him too general as to the admission of the witness; and that he should admit him.

Taylor was called; but on being put into the box, refused to answer any question respecting the bill. The Defendant having no other witness, the Plaintiff had a verdict.

Law, *Garrow*, and *Giles* for the Plaintiff.

Erskine and *Espinasse* for the Defendant.

THOMPSON *v.* DONALDSON.

To prove a person dead, the prosecution of the letters of administration granted by the ordinary, is not of itself sufficient evidence.

ASSUMPSIT on a policy of insurance on a ship from *Demerary* to *London*.

It became a question how far the underwriter was bound from the signing of the memorandum, before the policy was actually signed.

Lord KENYON said, that he should hold the underwriter bound from the time of the signing the memorandum, if the policy was actually signed afterwards.

The

The defence relied on was, that a person of the name of *Donoghoe*, in whom the interest was averred to be, was dead at the time of effecting the policy.

To prove this, the Defendant's counsel proposed to give in evidence the letters of administration, granted to a person as administrator to *Donoghoe*.

Lord KENYON said, he would expect further proof of the person's death than the mere production of the letters of administration: administration had often been fraudulently taken out when the party had been living, and afterwards been repealed. Whether *Donoghoe* was living or dead, was a fact capable of other proof, which the Defendant should have been prepared with.

The Defendant having no other evidence, the Plaintiff had a verdict.

Erskine and *Giles* for the Plaintiff.

Law and *Garrow* for the Defendant.

Vide *Lloyd* v. *Finlayson*, ante vol. 2, 564.

RUNQUIST *v.* DITCHELL.

If a ship is put up at the Royal Exchange and at the coffee-house by the ship's broker, as a general ship warranted to sail with convoy, and handbills are put about to the same effect, this is such a representation as shall bind the principal.

THIS was a special action on the case.

The action was brought against the Defendant as the owner of the ship *Cromer*, under the following circumstances: She was put up at the coffee-house as a general ship for *Oporto*, warranted to sail with convoy: the Plaintiff shipped goods on board her, and effected a policy on her, "on goods on board the *Cromer* warranted to sail with

with convoy." She did not sail with convoy, and was lost: by reason of not complying with the warranty, the policy became void as against the underwriters; and the present action was brought to recover in damages the value of the goods, which it had been intended should have been covered by the policy.

The ship broker was called: he proved that he had put up the ship as a general ship for *Oporto*, at the usual places at the Royal Exchange; that the captain had during that time been frequently at the Exchange; that he had signed bills of lading, in which the ship was warranted to sail with convoy; and that hand-bills to that effect had been handed about.

The captain was called; but denied having given any authority so to represent the ship.

Lord KENYON said, the Defendant must be bound by the act of his agent the broker; if he did what he had done, without authority, it was a question between the Defendant and his agent; the public had nothing to do with it.

Garrow contended, that if the agent exceeded his authority, the principal was not bound by it; and that there was not sufficient evidence in this case to bind the principal (the Defendant) and to make him liable.

Lord KENYON said, that he thought there was a sufficient representation of the ship's sailing with convoy, from the manner in which it was published and announced to the world; it was in the common and usual way. He remembered a case at *Hereford*, where a gentleman having lost some horses, an hand-

bill was put out, and generally circulated, offering a reward for the recovery. A person having enabled him to recover the horses, applied for the reward offered by the advertisement; which the gentleman then thought fit to disavow. An action was brought; and it was held, that the publicity of the hand-bills, and their general circulation, must be sufficient to charge the party with being privy to their circulation; and the Plaintiff recovered.

As to the agent having exceeded his authority, that made no difference in the case: many cases might be put, where a person has authorized another to do acts for him, and who has been bound by his acts though exceeding his authority; such as merchants who have authorized their clerks to accept bills for them; and many other instances. He was therefore of opinion that the Defendant was here bound by the acts of his agent, and the Plaintiff entitled to recover.

The jury found a verdict for the Plaintiff.

Erskine and *Giles* for the Plaintiff.

Garrow for the Defendant.

Vide 3 Term Rep. 763; and *E. I. Company* v. *Hensley*, ante vol. i. 111.

BULLER and others *v.* FISHER and others.

Where there is an exception in a charter-party of "*perils of the sea*," a loss from the ship's running foul of another by misfortune is within the exception, and is a loss by perils of the sea.

THIS was an action against the Defendants, as the owners of the ship *Atlas*, to recover damages for the loss of goods which had been shipped by the Plaintiff.

The bills of lading were in the usual form, with an exception of the *perils of the sea.*

The case as it appeared in evidence was, that two ships, called the *Patriot* and the *Matthew*, were sailing in one direction, and the *Atlas* in another; the *Matthew* was to leeward when they saw the *Atlas* coming; the *Matthew* steered to keep closer to the wind, in order to give the *Atlas* an opportunity to pass: the *Atlas* mistook the object; and unable to weather both ships, she and the *Patriot* ran foul of each other, and the *Atlas* went down.

The action being against the Defendants on the charter-party, it was admitted that if the injury could be deemed to be an accident arising from the perils of the sea, the Defendants were excused under that clause in the charter-party; but it was contended, that the *Matthew* having endeavoured to keep out of the way of the *Atlas*, the accident happened from the negligence of the crew of the latter; and so could not be deemed a peril of the sea.

Lord KENYON said, if the Defendants have been guilty of any degree of negligence, and it could have been proved that the accident could have been prevented, they would certainly have been liable;

 but

but they are exempt by the condition of the charter-party from misfortunes happening during the voyage, which human prudence could not guard against,—against accidents happening without fault in either party. I am of opinion, that neither ship could be deemed to be in fault: and that the misfortune must be taken to be within the exception of the perils of the sea.

The jury, which was a special one, were about to find a verdict for the Defendant, when the Plaintiff consented to be nonsuited.

Erskine, *Law*, and *Giles*, for the Plaintiff.

Garrow, *Gibbs*, and *Park*, for the Defendant.

Vide post, Proprietors of *Trent* Navigation v. *Wood*.

REX v. TEASDALE, GRANT, *et alt.*

A witness entitled to a share of a penalty under the statute 21 Geo. III. ch. 37, is a good witness on an indictment under the statute.

INDICTMENT against the Defendants, under the statute, for exporting machines used in the manufactures of this country.

Under the statute the informer is entitled to part of the penalty.

He was called as a witness, and objected to on the ground of interest.

Lord KENYON overruled the objection, saying the point had long since been overruled in a case in Sir *James Burrow*'s Reports, soon after Lord *Mansfield*'s coming into the court, in cases of bribery.

Grant was found guilty, the others were acquitted.

Mingay, *Law*, *Dampier*, and *Pooley* for the prosecution.

Erskine, *Macintosh*, and *Smith* for the Defendants.

SITTINGS AFTER TERM AT GUILDHALL, IN THE COMMON PLEAS.

RATCHFORD *v.* MEADOWS *et alt.*

December 6th.

Where the owners of a ship belonging to an out-port have regularly conveyed away their interest, and the certificate of registry has been entered with the proper officer of that port, and a copy transmitted to the custom-house in *London*, an omission of the officer in *London* to make the entry in the custom-house books there, shall not subject them as owners.

ASSUMPSIT by the Plaintiff for wages as a sailor on board a ship, charging the Defendants as the owners.

The service was not disputed; and the defence relied on was, that the Defendants were not the owners when the service was performed: the service was from the 8th of *December* 1798, to *October* 1799.

Previous to the bringing of the action the Plaintiff had examined at the office for ships' registers at the custom-house, and had procured the names of the Defendants on the record, who then stood in the books as the owners at the time of the commencement of the service, and when the action was brought.

The Defendants in their defence admitted, that they had been owners of the ship in question; but relied they had parted with their interest in her in *March* 1798, which was previous to the Plaintiff's service.

To prove their having parted with their interest at thetime by regular conveyance, the Defendants

produced a deed of conveyance of all their interest in the ship to certain persons in *Liverpool* (to which port the ship belonged) mentioned in the conveyance: that there had been a regular indorsement on the certificate of registry, entered with the proper officer of the port of *Liverpool*, and a copy of it transmitted to the custom-house in *London*; and that all these matters had taken place before the month of *October*, 1798; from whence their counsel contended, that they had conformed to every thing required by the statutes 26 *Geo.* III. ch. 60, and 34 of *Geo.* III. ch. 68; and that the omission of the entry of the names of the new owners in the custom-house books of the port of *London*, was a neglect of the officer, from which they ought not to suffer.

The Plaintiff's counsel contended, that in all the cases which had occurred on these statutes, a strict construction had been put, and that the register of the transfer of the ship in the custom-house books of the port of *London* was necessary to the complete transfer of the property, before which time nothing vested in the purchasers, and of course that they could not be deemed legal owners at the time of commencing the action.

Lord ELDON having referred to the statutes, said, the statutes contained clauses of different natures; in some of the clauses it was expressly ordered, that certain requisites should be complied with, on failure of which, the statutes had declared the transfer to be null and void; but that there were other clauses which were merely directory; of which description he was of opinion that which respected the re-

gistry

gistry was; that any defect in the form of registering did not make the sale void; and that the sale notwithstanding might be valid, and the property completely out of the vendors; but that in the present case the register was regular at *Liverpool*, to which port the ship belonged; and he would not allow the omission or irregularity of the clerk of the custom-house in *London*, whose duty it was to make the entry, and to whom it had been regularly transmitted, to destroy the validity of such a contract.

The Plaintiff was nonsuited.

Cockell, Serjeant. and *Espinasse* for the Plaintiff.

Shepherd, Serjeant, and *Littledale* for the Defendant.

Vide *Rolleston* v. *Hibbert*, 3 T. Rep. 406.

SIGARD *v.* ROBERTS.

If seamen go on shore on the ship's duty, and when the boat is about to return request to be permitted to remain on shore to get some victuals, which is refused, and the boat goes without them; if they afterwards go and offer to return to their duty on board the ship, it is not a desertion.

ASSUMPSIT for seaman's wages against the Defendant, as the captain of the ship *Elizabeth* on a voyage from *Hamburgh* to *Tranquebar*, from *Tranquebar* to any port the captain should think proper; and from thence to the port of *Hamburgh*, or any other port of delivery.

The Plaintiff signed the articles, and sailed on the voyage to the *Isle of France*, where she took in a cargo of coffee, sugars, &c. for *Hamburgh*, and was proceeding on her voyage, when she was met on the 29th of *March* 1799, in the *North Seas*, by his Majesty's ship the *Lord Duncan*, and taken and brought into the *Downs*, and libelled in the court of Admiralty as enemies' property.

 It

It was given in evidence for the Plaintiff, that he had come on shore with a boat from the ship, accompanied by the second mate and the surgeon: that he had remained on shore: but it appeared, that he and the other seamen, on being required to get on board, said they had had no victuals the whole of the day, and only requested to stay till they had some; and that being then left on shore, they had gone to the ship the next morning, when the Defendant refused to receive them, and dismissed them, refusing to pay them their wages, and desiring them to go to *Hamburgh* and seek them.

The counsel for the Defendant rested their defence, 1st, On the clause in the articles by which the crew were to serve on the voyage above stated, and back to *Hamburgh*, or wherever else the port of delivery should be: that the ship not having arrived at *Hamburgh*, or at any other port of delivery, the action was not maintainable until either of those events took place: 2dly, That by another (the 7th) clause in the articles, no seaman was to demand any money of the captain, but to be content with the wages he had received in advance until the voyage was ended, the cargo unloaded, and the ship cleared and brought into the proper moorings, under penalty of six marks; so that this was a bar to the Plaintiff's recovery in this country; 3dly, That this was a desertion, by which the seaman forfeited his wages, under the last clause in these articles.

Where by a clause in the ship's articles, the seamen are not to be en-

Lord ELDON. By the last clause in these articles, desertion is a forfeiture of wages; the law would have held the same language: the principal question, there-

therefore, here is, Is this a desertion? The Defendant undertakes to prove that it is; but, from the circumstances of the case, I am of opinion that it is not: the Plaintiff and the other seamen only requested to be permitted to remain on shore to have some victuals; it was a reasonable request; they had no intention of abandoning the ship; they in fact went on board as soon as they had the means, and were refused to be received After thus offering to return to their duty, the captain shall not be permitted to call such conduct a desertion, when the whole conduct of the Plaintiff shewed that no such was intended.

titled to their wages until the voyage was ended, and that voyage was to a foreign port, if the master for no good or legal cause dismisses the seaman before the ship's arrival at such port, he may immediately maintain an action for his wages.

The second question set up by the Defendant is, that the wages, if any are due, are recoverable at *Hamburgh* only; and it is therefore contended, that the captain cannot be sued in a foreign court of justice. It is a very wholesome provision, and it may be right law, that if a ship is captured, and the master and sailors all dismissed by the force of third persons, such clause should be effectual; but the question is, Has the Plaintiff a right to sue *here?* In this case the captain discharges the sailor. I should be sorry to state, that when the captain discharges the seaman, such seaman has not a right to sue for his wages. The seventh clause does not contain an express prohibition to sue in any country when the voyage is ended; this clause therefore cannot prevent the sailors suing for their wages when the master discharges them; the voyage then is ended as to the man who is discharged from the ship.

Verdict for the Plaintiff.

Cockell

Cockell and *Wigley* for the Plaintiff.
Shepherd and *Taddy* for the Defendant.

Dec. 18.

WHALLEY v. WRAY.

On a declaration against a lighterman in the common form for negligence, the Plaintiff cannot recover if it appear that the loss was not occasioned by a neglect of the common and ordinary duty of the Defendant.

THIS was an action of *assumpsit* against the Defendant, as a lighterman, for damage done to the Plaintiff's goods, which had been entrusted to him to deposit in the Plaintiff's warehouse.

The declaration was in the common form; *viz.* That the defendant being a lighterman, &c. had undertaken to carry the plaintiff's goods, and to deliver them safely; and then averred a loss by negligence.

The facts of the case were, that a quantity of rice had been delivered on board the defendant's lighter, to be landed at the Plaintiff's warehouse. Previous however, to rice being permitted to be landed, it is necessary to present a petition to the commissioners of the customs, who refer it to the land-surveyor, upon whose report it is permitted to be landed.

In this case a petition had been presented to the commissioners by Mr. *Stevenson*, who was the custom-house agent to the Plaintiff; but no report having been made on it, the land-surveyor refused to permit the rice to be landed; in consequence of which, it remained in the lighter undischarged, where it received the damage for which the present action was brought.

It appeared in evidence, that the presenting the petition, &c. was usually done by the custom-house agent

agent of the party to whom the rice belonged, and that it was not usually done by the lighterman.

Lord ELDON. In this case, the Plaintiff has declared generally in *assumpsit*. To entitle the Plaintiff to recover, it must appear that the loss happened by the neglect of doing that which was the regular and common duty of the Defendant. The law raises no presumption of what is his duty: that is matter of evidence: here it is in evidence, that the presenting the petition and the subsequent proceedings, was the business of the custom-house-agent of the Plaintiff, not of the lighterman: if there had been any contract, or undertaking on the part of the lighterman, by the neglect of which the goods were spoiled, it should have been the object of a special count: there is no such count, and the Plaintiff has relied on the general liability of the Defendant without making it out in evidence that it was the duty of the Defendant to have done that, from the neglect of which the loss has arisen.

The Plaintiff was nonsuited.

Cockell, Serj. and *Gibbs* for the Plaintiff.

Shepherd, Serj. for the Defendant.

CASES

ARGUED AND RULED

AT NISI PRIUS,

HILLARY TERM, 40 GEO. III.

IN THE KING'S BENCH,

SECOND SITTINGS IN TERM.

CHANDLER v. PARKES and DANKS.

Where the Plaintiff declares on a joint contract, and one Defendant pleads infancy, the Plaintiff cannot enter a *noli prosequi* and proceed against the other Defendant in that action, but should commence a new action against the adult Defendant only.

THIS was an action of assumpsit, for work and labour, and materials found, against the two Defendants.

Plea, by the Defendant *Parkes*, of the general issue.

Danks, the other Defendant, pleaded infancy.

The Plaintiff entered a *noli prosequi* as to the Defendant *Danks*, and proceeded to issue with the other Defendant *Parkes*.

Lord KENYON, on the case being opened, and looking into the record, said, he doubted how the Plaintiff could recover against one Defendant only, in an action on a contract which he by his declara-

tion,

tion, had stated to be a joint one against two: that the infancy being admitted, the Plaintiff ought to have discontinued, and commenced a new action against the adult Defendant, as being the sole contracting party according to the legal effect of such a contract, which was void against the infant.

The Plaintiff's counsel contended, that the promise of an infant was not void, but voidable only; and if the Plaintiff had declared against the adult Defendant only, he could have pleaded in abatement, that the contract was a joint one, and quashed the Plaintiff's writ. They then cited the case of *Noke* v. *Ingham**, 1 *Wils.* 89, where in a joint action against two, a *noli prosequi* had been entered against one, and held to be good.

Lord KENYON said he continued of the same opinion; for the plea in abatement could not prevail, when it was disclosed that the other Defendant was an infant.

His Lordship nonsuited the Plaintiff.

Erskine and *Lawes* for the Plaintiff.

Percival and *Jervis* for the Defendant.

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* The case of *Noke* and *Criswell* v. *Ingham* is clearly distinguishable from this case; for in that case, which was on a writ of error, the plea by *Chiswell*, one of the Defendants, was "bankruptcy." The defendant entered a *noli prosequi* as to him. The objection was taken that the *noli prosequi* entered as to one, operated as a discharge to both; but it was overruled, inasmuch as by the statute 10 *Ann*, ch. 15, it is enacted, "That the discharge of a debt as to one partner, by his becoming a bankrupt, should not discharge the other partner. By the operation of *the statute*, therefore, the other Defendant remains solely liable. The case of *Noke* v. *Ingham* therefore fortifies the opinion delivered by the Lord Chief Justice in this case.

SITTINGS

SITTINGS AFTER TERM AT WESTMINSTER,

IN THE KING'S BENCH.

Doe ex Dem. Griffiths v. Lloyd.

Where there is a demise of premises, and an entire rent reserved, if any part of the premises could not be legally demised, the whole demise is void.

This was an action of ejectment, to recover the possession of lands in the parish of *Shadwell.*

The lessor of the Plaintiff was the rector of the parish.

By an act of parliament passed in the year 1670, for the endowment of the church of *Shadwell*, certain lands were appropriated, part for the support of the parson, and part for the purpose of building a house for his residence.

By another clause in the act of Parliament, the parson was impowered, with the consent of the patron and ordinary, to lease for thirty-one years the lands allotted for the stipend of the rector: and he had himself a power of leasing for twenty-one years without fine, reserving the best rent which could be got.

In 1746, *Butler* was appointed rector of the parish: when he came into the parish, the whole of the land was let under lease. In 1776 he renewed that lease, at a rent of 28*l.* per ann.: in 1792 he renewed it at the same rent; and again in the year 1797.

Gibbs,

Gibbs, for the Plaintiff, stated, that the ejectment was brought to recover the whole of the premises demised by the late rector: And the Plaintiff grounded his right to recover on two points; 1st, That no lease of the land could be good, unless made under the authority of the act of parliament: that the act only allowed the letting of the land allotted to the rector for a stipend: that here the demise was of the whole of the lands, and included the land on which the parsonage-house was to be built, which he stated, could not be demised.

Lord KENYON said upon this point, that if the demise was of lands, and an entire rent reserved, and there was any part which could not be legally demised, that the whole of the demise was void.

The second point upon which the Plaintiff relied, was, that the best rent which could have been obtained for the lands had not been reserved.

The Defendant's counsel answered, that in 1772 the lands were of very small value: That the lessee had then laid out 1000*l.* on them, and the renewals had been to him.

In a lease of lands, for which the lessor is bound to reserve the best rent that can be got, he must reserve the best rent that can be got, at the time the lease is made, without any regard to a former lease in which the rent might have been fairly reserved on account of money to have been then expended in improvements.

Lord KENYON. There having been surrenders of the lease in 1792 and 1797, it is not sufficient to say that a rent reserved before was a sufficient rent then: the act of parliament says, there must be reserved the best rent that can be got and obtained; that means, the best rent that can be *then* got; that is, at the time of letting. It is said that in 1772 the premises had been let on a repairing lease, and 1000*l.* expended on them: if the fact is so, a court of equity might give relief if the twenty one years were

were not elapsed; but sitting in a court of law, I must look to the time of the last letting after the surrender in 1797; if the premises were *then* not let for the highest price that could be got for them, the Plaintiff is entitled to recover.

The Plaintiff had a verdict.

Gibbs and *Praed* for the Plaintiff.

Erskine and *Wood* for the Defendant.

ENGLAND *v.* BOURKE.

CASE, for words.

Plea, Not guilty

The words laid in the declaration were, "you are a thief and a murderer."

The Plaintiff had been tried for murder, and acquitted.

Per Lord KENYON. There is no justification of the truth of the words: had there been, notwithstanding the acquittal, I would have tried the truth of the plea.

Verdict for the Plaintiff.

Erskine and *Onslow* for the Plaintiff.

Mingay for the Defendant.

Vide post, *Cook* v. *Field*.

SITTINGS AFTER TERM IN THE COMMON PLEAS, AT WESTMINSTER.

SPEARS v. HARTLY.

February 19.

If by the custo and usage of trade, a party is entitled to a lien on goods for a general balance, and he gets possession of the goods of his debtor, he may hold them till satisfied his whole demand, even though part of it was barred by the statute of limitations.

THIS was an action of trover, for a log of mahogany.

The Defendant was a wharfinger, and claimed a lien on it, as well for the wharfage as for the balance of a general account; which balance was due in the year 1790, under which lien he justified a right to retain it.

Best, Serjeant, for the Defendant contended, that admitting the Defendant might claim a lien for the wharfage due on a particular article, he was not entitled to such lien for the balance of a general account.

Lord ELDON referring to the case of *Naylor* v. *Mangles*, *ante*, 1 vol. 109, said, This point has been ruled by Lord KENYON, that a wharfinger has a lien for the balance of a general account, and considered as a point completely at rest; I shall, therefore, hold it as the settled law on the subject, that he has such a lien as is claimed in the present case.

Best then contended, that it appeared that the balance which the Defendant claimed to be due, and under which he entitled himself to a lien, had accrued in the year 1790, and so was barred by the

statute of limitations; the debt being therefore discharged by operation of law, the Defendant could not be entitled to any lien by virtue of it.

Lord ELDON. If what has been stated by the Defendant's counsel be law, that the debt is *discharged* by the operation of the statute of limitations, no lien could be obtained by reason of it; but the debt was not discharged, it was the remedy only: I am of opinion, that though the statute of limitations has run against a demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien. In this case the Defendant had a subsisting demand when the goods came to his possession; and I am of opinion he may enforce it by the lien which the law has given him for his general balance.

Verdict for the Defendant.

Best, Serjeant, and *Reader* for the Plaintiff.

Cockell and *Bailey*, Serjeants, for the Defendant.

SITTINGS AFTER TERM AT WESTMINSTER.

CURTIS *v.* HANNAY, Bart.

To an action for the recovery of the price of a horse, it is no defence that the warranty was untrue, if the Defendant was, after the sale, apprized of the fault of the horse, and did not return him; but, afterwards, by the application of medicines, or otherwise, has lessened the value of the horse, from what it was at the time of the sale.

ASSUMPSIT for forty-five guineas, the price of an horse sold by the Plaintiff to the Defendant, who was an officer in the life guards.

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The horse had been warranted; and the defence set up upon the part of the Defendant was, that the warranty had not been complied with, the horse having defective eyes when sold.

It appeared that the Defendant had been informed of the defect in the eyes the day after he bought the horse; that he however kept him for near seven weeks before he returned him; in the course of which time, suspecting the horse had some defect in his feet, he had applied a blister and some other medicine to the part; this produced a disorder called a thrush, and a considerable degree of lameness: it was however, only a temporary lameness, and the horse recovered of it; and it was in evidence that the remedies applied to the leg and foot could not have affected the eyes.

On this case being thus made out, Lord ELDON said, he thought the matter set up by the Defendant was no defence to the action; it appeared that the horse had defective eyes when sold, and that that defect was made known to the buyer a very short time after he had purchased him. Instead of returning him immediately, the Defendant doctored him: this produced a new disorder, which the horse had not when sold. The question was, Would the horse when returned to the seller be diminished in value by this doctoring? If he would, his Lordship said, he thought the Defendant should pay the price, and bring his action against the seller for any defect in the warranty existing at the time of the sale. He took it to be clear law, that if a person purchases an horse which is warranted, and it afterwards turns out that the horse was unsound at the time of the

 war-

warranty, the buyer might, if he pleased, keep the horse, and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; or he might return the horse, and bring an action to recover the full money paid; but in the latter case the seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value; for, his Lordship said, if a person keeps a warranted article for any length of time after discovering its defects, and when he returns it, it is in a worse state than it would have been if returned immediately after such discovery, I think the party can have no defence to an action for the price of the article, on the ground of non-compliance with the warranty, but must be left to his action on the warranty to recover the difference in the value of the article warranted, and its actual value when sold.

His Lordship concluded with saying, that if the jury thought that if any future purchaser was to be told that the horse had been blistered and doctored, it would diminish his value in the estimation of such purchaser, they should find a verdict for the Plaintiff; which they accordingly did for forty-five guineas, the price agreed upon.

Cockell, Serjeant, and ——— for the Plaintiff.

Shepherd, Serjeant, for the Defendant.

GRATLAND *v.* FREEMAN.

Same day.

Where a party has dealt with a tradesman on credit, it is not sufficient to give notice to the tradesman's servant that he meant to pay ready money in future, it must be given to the tradesman himself.

ASSUMPSIT for beer sold by the Plaintiff, a publican, to the Defendant.

It appeared that the Defendant had been in the habit of dealing with the Plaintiff upon credit, and had paid him occasionally when the bill amounted to a certain sum.

About the month of *October* he had paid his bill; and told the Plaintiff's servant who brought the beer, that he would run up no more bills with the Plaintiff, but would pay for the beer as it came in; and the defence was, that he had paid the money to the servant.

Lord ELDON said, he must shew that the master had notice of this change in the mode of dealing: unless he had done so, it must be taken that the Plaintiff understood that the dealings between him and the Defendant continued in the usual way.

Marshall, Serjeant, for the Defendant, contended, that this notice having been given to the Plaintiff's servant, and the money having been paid to the servant, the master should be bound by it.

Lord ELDON said, he thought not. It was a change in the usual mode of dealing suggested by the Defendant himself; and as he had personal dealings with the master in a particular mode, notice to the servant alone of a change in that mode would not be sufficient: the Defendant must shew that the master himself had notice of it, or he could have no defence to the action.

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The Defendant being unable to establish that fact, the Plaintiff had a verdict.

Runnington, Serj. and *Maddock* for the Plaintiff.

Marshall, Serj. for the Defendant.

HOULDITCH *et alt.* *v.* MILNE.

If a tradesman, having goods in his possession, upon which he has a lien, parts with those goods on the promise of a third person to pay the demand, such promise is not within the statute of frauds.

ASSUMPSIT for the repair of carriages.

The case in evidence was, that the carriages belonged to a Mr. *Copey*: that the Defendant had sent them to the Plaintiffs to be repaired, and had given orders respecting them.

One of the carriages had been bought by Mr. *Copey* himself, and paid for by him; and the bill which was the object of the present action, contained a charge for repairs done to this carriage, and was made out in the name of *Copey*.

When the carriages were repaired, the Defendant sent an order to pack them up, and send them on board ship: the Plaintiffs upon this sent to him to know who was to pay for them. The Defendant said, he had sent them, and he would pay for them.

In consequence of this, the carriages were packed up and sent on board ship; and the bill was made out and delivered to the Defendant: he desired time to look over it; and when the Plaintiff's clerk called a second time, he said the charges appeared very high; but desired the clerk to call in a very few days, and he would settle it. Not having done so, Mr. *Phillipson*, the Plaintiff's attorney waited upon him; when he said he was told the bill was a most exorbitant one, and a fit subject to refer: he however

said,

said, he had the money to pay it; but did not say whether his own or Mr. *Copey*'s.

Upon this, *Best*, Serjeant for the Defendant, contended, that there being no proof of the Defendant's having money of Mr. *Copey*'s in his hands to apply to the count in the declaration for money had and received, the Plaintiff must be nonsuited; and said, it came exactly within the principle of *Matson* v. *Wharam*, 2 Term. Rep. 80; in which it was decided, that if the person who had the goods was at all liable, the undertaking of another must be in writing. The question therefore was, Was Mr. *Copey* himself liable to the Plaintiffs? If so, the present action could not be supported.

He contended, that this must be taken to be the fact, as the bill sent to the Defendant was made out in *Copey*'s name, and contained charges for work done by *Copey*'s own order; that every thing done by the Defendant was done in his character of agent to Mr. *Copey*; and there being no note in writing, he was not personally liable.

Lord Eldon said, he was not disposed to nonsuit the Plaintiff. In general cases, to make a person liable for goods delivered to another, there must be either an original undertaking by him, so that the credit was given solely to him; or there must be a note in writing. There might, however, be cases where this rule did not apply. If a person got goods into his possession, on which the landlord had a right to distrain for rent, and he promised to pay the rent, though it was clearly the debt of another, yet a note in writing was not necessary: it appeared to apply precisely to the

present case. The Plaintiffs had to a certain extent a lien upon the carriages, which they parted with on the Defendant's promise to pay: that, he thought, took the case out of the statute, and made the defendant liable for the amount of the bill.

The Plaintiffs had a verdict, subject to a reference with respect to the charges on the bill.

Bayley, Serj. and ——— for the Plaintiff.

Best, Serjeant, for the Defendant.

Vide *Williams* v. *Leper*, 3 *Burr.* 1886.

VINER, Administratrix, *v.* CADELL.

Where the wife of a bankrupt has administered to her father, and becomes possessed as administratrix of his effects, to which she and infant-brothers and sisters are entitled, and the husband has continued the business of the father for their benefit, that is not such a possession of the goods as shall be deemed an ordering and disposition within the statute 21 Jac.

TROVER, for furniture taken by the Defendant, as messenger under a commission of bankrupt, against one *Viner*, then deceased.

The Plaintiff, who was the widow of the bankrupt, was also administratrix to one *Lyons*, her father; and the goods in question had been the property of *Lyons*, who had left the Plaintiff and three other children, all of whom were infants, except the Plaintiff.

The defence was, that the bankrupt took possession of the house and the furniture claimed by this action, after *Lyons*'s death, and carried on the business of a baker, which *Lyons* had carried on in his life-time; and *Cockell*, Serjeant, contended, that this was an ordering and disposition within the statute 21 *Jac.* ch. 19, and was a justification to the Defendant for seizing the goods under the commission against *Viner*.

Lord ELDON said, the statute did not apply to a case like the present, it only applied to cases where the

the parties, whose property was in the bankrupt's possession, were capable of asserting their claim; and not to those in which the rights of infants were implicated: that it was every day's practice for the children of a testator or intestate to apply by petition to the Chancellor, where the property of their father had been seized under a commission of bankruptcy, against his executor or administrator; that the assignees might account for whatever property belonging to their father, which the bankrupt had in *autre droit*, as executor or administrator, and which had got into their hands: that he should therefore not hold this to be property subject to *Viner*'s bankruptcy, as far as respected the rights of the infant children.

His Lordship said, he thought the Plaintiff had been ill-advised in bringing the action, as it would not settle the rights of all parties. The Plaintiff, as one of the four children of *Lyons*, was entitled to one-fourth part of his property: that part perhaps the assignees had a right to, she being the wife of the bankrupt; but as she was also administratrix of *Lyons*, if his estate was insolvent she could have no right to any part of it; the property must therefore be directed to be all converted into money, and *Lyons*'s creditors paid first. There were therefore, perhaps, in the present case, the rights of many persons involved. Where a bankrupt was executor or administrator without any interest, his assignees could have no right whatever to any of the property in his possession in his character of administrator or executor; but where he was interested with others in property, he would be tenant in common with them, and his assignees would stand in the

same

same situation: and his Lordship said, he did not see how an action of *trover* could be maintained by one tenant in common against another; and till it appeared whether the Plaintiff was entitled to the whole property as administratrix of *Lyons*, in case the estate was insolvent, or only to a share of it, as one of *Lyons*'s children, to which the assignees would be entitled, as being the property of the wife of the bankrupt, he did not see how the action could be maintained.

It appeared that *Viner*, the bankrupt, was by trade a coachmaker, but had carried on the business of a baker (in which business the debt, which was the foundation of the commission, had been contracted) for the benefit of the brothers and sisters of his wife, *Lyons* their father having been a baker. And *Best*, Serj. for the Plaintiff, contended, that not having carried on business for his own benefit, he could not be a bankrupt.

Lord ELDON. That will not prevent him from being a bankrupt: an executor who carries on the business for the benefit of the testator's children, may be a bankrupt.

In order to prove that *Lyons*'s estate was insolvent, *Best*, Serj. offered in evidence the account furnished by the Plaintiff, as administratrix in the Commons; to the truth of which she had sworn there: and he submitted that, as he could not call herself as a witness, it was the next best possible evidence.

Lord ELDON thought it was not; but said that if the Plaintiff's counsel desired it, he would reserve the point.

A ver-

A verdict was taken for the Plaintiff; and Lord ELDON said he would consider the matter, and give his opinion the next day as to the best mode of settling the rights of the different parties, without compelling them to go into the court of Chancery.

Best, Serjeant, and *'Espinasse* for the Plaintiff.

Cockell, Serjeant, for the Defendant.

SIMMONS *v.* WILMOTT and others.

* Same day.

Parish-officers are bound to take care of casual poor; and if a person, not a parish-officer, takes care of a person coming within that description, and for whom the parish-officers would be liable to provide, he has a right to recover against them the expences incurred on such an occasion.

THIS was an action of assumpsit, against the Defendants, as churchwardens and overseers of the poor of the parish of *Isleworth*, for meat, drink, lodging, medicine, attendances, &c. found and given for one *Thomas Shaw*.

The case in evidence was, that *Shaw*, who was carter to a Mr. *Willan*, residing at *Marylebone Park* (not within the parish of *Isleworth*) had been thrown from the cart, within the parish of *Isleworth*, and severely bruised; so much so as to render it unsafe to remove him. He was brought to the Plaintiff's house, where he was kept and attended for ten days, until he recovered: for this, and money paid to the nurse, &c. the present action was brought.

Shepherd, Serjeant, in opening the case for the Plaintiff, stated it to be a question of very great importance, as it was to determine whether a person, not a parish-officer, who afforded relief to a person

under-

under the pressure of immediate want, who came within the description of casual poor, could call upon the parish-officers to be reimbursed the expences he might have incurred in the necessary relief of such person.

Before he went into the question of their liability in point of law, without any express promise, or direction to take care of the person requiring relief, he proved that when *Shaw* was brought to the Plaintiff's house, he (the Plaintiff) sent to one of the overseers, to inform him of it. The overseer directed the person who brought the message, to go to the beadle; and also desired him to assist in taking care of the man. It appeared that *Shaw* was a weekly servant to Mr. *Willan;* and that after he had recovered, the Plaintiff applied repeatedly to Mr. *Willan*, to pay him for the expences incurred in taking care of *Shaw;* and sent him in a bill amounting to 8*l.* 18*s.* 6*d.*: Mr. *Willan* offered him 5*l.* 5*s.* which he refused to take; and he then applied to the parish-officers, and sent in a larger bill to them: it also appeared, that after the man had recovered, the vestry had made an order, stating, "That as an encouragement to humanity, they had ordered *Simmons* five guineas; but, at the same time, protested against their liability to reimburse him for the expences incurred, knowing *Shaw* to be a servant of Mr. *Willan*, and conceiving Mr. *Willan* liable; and the five guineas was merely voted as a voluntary donation, or reward for his humanity: this sum the Plaintiff also refused to accept, and brought his action against the Defendants,

Defendants, as parish-officers, for all the expenses incurred.

Lord ELDON. The questions in this case are, 1st, Whether *Simmons*, in point of law, has a demand against the parish-officers, either from the liability imposed upon them by law to take care of casual poor, or by express agreement? and, 2dly, Whether, having such demand, he has relinquished it, and bound himself to adhere to the demand he first made against *Willan*, as the master of *Shaw*? The case is new to me. It has been decided, that if a servant in husbandry has received relief from the parish-officers, they cannot recover it against the master, as not being of that description of servants for whom the master is bound to provide: but that if he was of that description, the parish-officers could recover.—My Lord KENYON has ruled, that when a servant, living under the roof of his master, falls sick, the master is liable for medicines provided for the servant, if his illness has not been the consequence of his own misconduct or debauchery. If *Shaw* had been a servant of that description, *Willan* would have been liable; but it does not follow that because *Willan* might be liable, the parish-officers are thereby excused. It comes to this point, Was the person relieved, within the description of casual poor? If he was, the parish-officers are bound to take care of him: a common person would not; but if a common person does take care of him, on the liability of the parish-officers, I think he has a right to recover against them.

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With respect to the application in the first instance to *Willan*, the Plaintiff might have reasoned thus: "I will try to get the money from *Willan*, in order to relieve the parish." That alone will not discharge the parish-officers; there must have been some express abandonment of his claim against the Plaintiffs, and an admission that he would look to *Willan* alone. He has acted imprudently, perhaps wrong, in sending in a bill to the parish-officers larger than the one he sent in at first to *Willan;* and he must be bound by the first bill; but even if you should think 8*l.* 18*s.* 6*d.* too much, and that five guineas is sufficient; if under all the circumstances and the law, as I have stated it, you should be of opinion that the parish-officers are liable, I think you must give a verdict for five guineas, notwithstanding the order of vestry; for I do not think the order of vestry, protesting against their liability, and offering it as a voluntary kindness, can be considered as a tender of so much.

Shepherd, Serjeant, and —— for the Plaintiff.

Cockell, Serjeant, and *Rain* for the Defendants.

CLEMENT v. MILNER *et alt.*

Friday, Feb. 21.

To support a justification for taking cattle as a distress for damage *feasant* if it appear that the party distraining had not actually got into the *locus in quo* before the cattle had got out of it, the justification cannot be supported.

TRESPASS for taking a cow.

Justification by one Defendant, as owner of a field of turnips; and by the other as his servant, as a distress for damage *feasant.*

It appeared in evidence that the cow had broke into a field of turnips belonging to the Defendant: a woman picking turnips in the field turned her out: the fences (which it appeared the Plaintiff was bound to repair) were in a very ruinous state, and the cow returned; the same woman was about to turn her out again, when one of the Defendants being in an adjoining field, and seeing her endeavouring to turn the cow out, called out to her to stop, and ran towards the place where the cow was; the woman not having heard him, turned the cow back into the Plaintiff's field, and she had got back some way into the field before the Defendant came up: he followed the cow into the field, and called the other Defendant to his assistance: they drove her back into the Defendant's field, and from thence to pound.

There was rather contradictory evidence as to the fact, whether the Defendant had actually got into the field where the trespass was done, before the cow had been turned out of it, or not.

Lord ELDON, in his address to the jury, said, they were to consider that fact. If the Defendant *Clements,* in the act of coming up, in order to distrain the

the cow, had actually got into the field where the cow was committing the trespass, before she had been turned out of it, the justification was proved; and they should find a verdict for the Defendant. If they were of opinion that the cow was actually out of the *locus in quo* before the Defendant had got into it, though he might be in the act of approaching, in order to distrain her, they must find for the Plaintiff.

The jury found a verdict for the Plaintiff.

Cockell, Serjeant, and *Kyd* for the Plaintiff.

Clayton, Serjeant for the Defendants.

Same day.

PRICE *v.* MESSENGER *et alt.*

The jurisdiction of magistrates cannot be tried in an action against their officers; and if the officers have a warrant, whether it is illegal or not, an action cannot be maintained against them for doing any thing ordered by the warrant, without a previous demand of a copy of it. *Aliter*, if the acts complained of were not authorized by the warrant.

TRESPASS for taking goods, viz. sugar, tea, nails, a cask, and a bag; and for assaulting and imprisoning the Plaintiff.

Plea,—Not guilty, as to the taking the sugar, and the assault and imprisonment; and admitting the taking of the rest of the goods.

The Plaintiff was a grocer in *Coad's Road, St. George's Fields*.

The Defendants were runners to the police-office, *Queen-square, Westminster*.

Shepherd, Serjeant, in his opening, stated, that the action was brought against the Defendants as officers acting under a warrant.

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Lord ELDON interrupted him, and said, if they acted under a warrant, the action should not be against the officers; it should have been against the magistrates who granted the warrant, or against the person upon whose information it was granted; whom the magistrates ought to give up.

Best, Serjeant, on the same side, contended, that if the magistrates had no authority to grant the warrant, or if the warrant was to take particular goods, and the officers took other and different goods not mentioned in the warrant, they thereby exceeded their authority, and could not justify under the warrant.

Lord ELDON assented to the latter position, but said, they could not try the jurisdiction of the magistrates in an action against the officers: the warrant, as far as it went, being a justification for them.

Cockell, Serj. for the Defendants, objected: that the first step in the cause should be for the Plaintiff to prove a demand of a copy of the warrant.

Lord ELDON said, the declaration did not charge the Defendants as officers. If they meant to justify under the warrant, the proof of that lay on them: when they came to that part of the case, the Plaintiff must prove a demand of a copy of the warrant.

It appeared that the goods had been carried to the police-office; and *Best*, Serjeant, was proceeding to examine as to how long they had been detained there.

Lord ELDON stopped him, and said, he could not go into evidence of any thing done after the goods had been brought to the office; the magistrates were answerable for that.

Officers are not liable for any injury done to property which they may have seized after they have brought it to the magistrates' office.

The warrant was produced in evidence: upon which Lord Eldon referred to the stat. 24 *Geo.* II. ch. 44; and said, that the magistrates not having been joined, there must be a verdict for the Defendants upon the production of the warrant; as the want of jurisdiction in the magistrates could not then be enquired into.

Shepherd, Serjeant, submitted, that if the warrant was manifestly, and on the face of it, illegal, the statute did not apply.

The warrant when produced appeared to be a warrant, stating, that there had been lately stolen from some ship or ships, in the river *Thames*, a quantity of sugar; and that there was reason to suspect that the same was knowingly concealed or deposited in the Plaintiff's premises: it then authorized the Defendants to search for the same; and if found, to bring it, and the person or persons in whose custody or possession it should be found, before the justices. The sugars seized were not concealed, but exposed in an open part of the shop.

The warrant was founded on the act 2 *Geo.* III. ch. 28, commonly called the *Bum-boat Act*, which authorizes magistrates to issue warrants to seize goods suspected to be stolen from such ship or ships; and it directs actions for any misconduct in the execution of, or in granting such warrants, to be brought in *Middlesex:* and *Shepherd*, Serj. then contended, that the warrant was not within the act; and that the officers had seized goods not authorized by the warrant. He further observed, that if the warrant was not according to that statute, it must be taken to be founded on the general jurisdiction of magistrates;

and

and therefore as the goods had been taken in the county of *Surry*, if the action had been brought in that county, under the idea that the warrant had been issued under the general authority of magistrates to issue warrants to seize stolen goods, on production of the warrant, and proving that it was founded on the bum-boat act, the Plaintiff must have been nonsuited for not bringing his action in *Middlesex*; and, on the other hand, if founded on the general authority of magistrates, the offence having been committed in *Surry*, he must have been nonsuited for laying the *venue* in *Middlesex*, which would be a case of great hardship on the Plaintiff.

Lord ELDON admitted the consequence that would follow, if the case was as *Shepherd* stated, but said, he would not then decide the question, whether the warrant was illegal or not: he would however assume that the warrant was wholly illegal; and in order to save the expence of a new trial, in case the court should be of opinion that the warrant was a justification for the officers, and that a copy of it ought to have been demanded, he would direct the jury to assess damages separately upon that part of the trespass to which the plea of not guilty applied, and that which was admitted, with leave for the Defendant to move to set aside the verdict, if a copy of the warrant ought to have been demanded.

In an action against officers for seizing goods or imprisoning Plaintiff, he cannot go into evidence of any special damage, if he has brought an action against the person who gave the information on which the officers acted, and which is then depending.

The Plaintiff's counsel was proceeding to shew, that in consequence of the goods being seized, and his having been apprehended, he had lost his business, and had been much injured.

Bayley, Serjeant, for the Defendants, interrupted the witness, and asked if the Plaintiff had not

brought an action against *Naish*, the person who had lodged the information before the magistrates; and if such action was not then depending.

Being answered in the affirmative, he objected to the Plaintiff's going into evidence of this special damage in an action against the officers, while he was seeking for redress for this part of the injury against another person.

Lord ELDON thought it would not be proper to admit such evidence.

The goods had been carried to the magistrates office; and when it was discovered that the information had been ill-founded, the goods were restored, and the Plaintiff took away the sugar and nails, but refused to take away the teas, as he had no permit to bring them back into his stock.

If goods which have been seized and brought to the magistrates' office are afterwards restored, as having been seized illegally, and the party cannot remove them back without a permit, it is the duty of the magistrates to procure such permit.

Lord ELDON said, it was the duty of the magistrates to have procured a permit, and to have restored the goods, when they found they had been seized without proper cause. His Lordship, in his address to the jury, observed, that the officers could not be justified in taking the tea and nails. If after they had come into the house, they suspected there were other stolen goods in it besides those specified in the warrant, and went back to the magistrates to inform them of their suspicions, and the magistrates gave them only a verbal order to seize the goods, such would not justify the officers in seizing them. His Lordship added, The warrant in the present case appears to be grounded rather on the old law, and the general jurisdiction of magistrates with respect to stolen goods, than on the bum-boat act. I will not, however, here decide whether it is illegal on the face

face of it, or not; but for the purpose of saving the expence of a new trial, in case the court should be of opinion that it is a legal one; or that at all events there having actually been a warrant, a demand of it was necessary previous to bringing the action, I will assume it for the present, as being no justification to the officers; and you will assess the damages separately on that part of the trespass which is admitted, and that to which the plea of not guilty applies.

The jury accordingly found a verdict for the Plaintiff for 30*l.* for taking the teas, nails, and cask; and 70*l.* for seizing the sugar, the assault and imprisonment, subject to the opinion of the court on the latter point.

Shepherd, Serj. *Best*, Serj. and *Lawes* for the Plaintiff.

Cockell, Serj. and *Bayley*, Serj. for the Defendants.

In the next term the Defendants moved to set aside the verdict; and a rule was granted as to the 70*l.* which was afterwards made absolute: the court being of opinion, that whether the warrant was legal or not, a demand of it was necessary, under 24 *Geo.* II. ch. 44. Vide 2 Bos. and Pull. 158.

Vide post, *Cooper et alt.* v. *Booth.*

DAVIES *v.* RIDGE and others.

Same day.

Trustees by submitting matters to arbitration, do not make themselves personally liable.

ASSUMPSIT upon an award, and for money had and received against the Defendants, as trustees of a Mr. *Pigot*, of *Peplow*, in *Shropshire.*

The Plaintiff had been a judgment-creditor for 9000*l.* part of which had been paid; and it had

been referred to arbitration, to ascertain how much was really due upon the judgment. The arbitrators had made an award in favour of the Plaintiff.

Lord ELDON said, the Plaintiff must shew the Defendant had effects of the trust-estate; submitting to arbitration did not make them personally liable.

Mr. *Ridge*, one of the trustees, had admitted that he had money of the trust-estate in his hands; and *Lawes* for the Plaintiff, submitted, that this admission of one of them bound the rest.

An admission by one trustee will not bind his co-trustees: *aliter*, where parties are personally liable.

Lord ELDON. It would, if they were all personally liable; but not where they are only trustees.

Marshall, Serjeant, and *Lawes* for the Plaintiff.

Shepherd, Serjeant, for the Defendant.

IN THE KING'S BENCH,

SITTINGS AFTER TERM AT GUILDHALL.

Saturday, Feb. 21.

RICHARDS *v.* BORRETT, Esq.

Where deeds respecting real property have been deposited as a security for an annuity, *e. g.* it implies an intention in the party depositing them to charge the real property, and gives the party with whom they are deposited a lien on them.

ASSUMPSIT for money had and received.

The Defendant being in the Fleet Prison, and distressed for money, had applied (by means of one *Bryant*, an attorney) to the Plaintiff, to borrow some: the Plaintiff lent him some money, and took from the Defendant a bond and warrant of attorney, to secure an annuity.

Shortly after, the Defendant applied through the same channel to the Plaintiff to borrow more money;

the

the Plaintiff required a further security than a bond and warrant of attorney; and the Defendant deposited with him the lease of a farm in *Kent*, which he represented as unincumbered; and it was endeavoured to be proved, that he meant to charge this real property with payment of an annuity for the latter sum advanced; but the Defendant's counsel asserted that it was only deposited with a view to secure the payment of the rent by the tenant in discharge of the annuity.

The proof not coming up exactly to that point, Lord KENYON said, it had been held in equity, that depositing all, or even part of the deeds respecting real property, implied an intention of charging the real estates, and gave the party a lien upon them; and that as this was an equitable action, he would hold the same doctrine.

No memorial of the first annuity had been registered, nor had any deed to charge the real property with the second annuity been registered; and the annuity having been in arrear, the present action was brought to recover the consideration-money.

No application had been made to the court to set aside the first annuity; and *Erskine* for the Defendant contended, that the securities were only voidable; and that being still in existence, the present action could not be maintained.

Lord KENYON thought the objection was well founded, with respect to one annuity; the party should be called upon to complete the securities;

and those for part having been completed as far as the party had been called upon, they must be considered as valid until set aside by the court; but, with respect to the other, the Defendant not having done, or being unable to do, that which he had undertaken; namely, to charge the real estate, the Plaintiff was entitled to recover the consideration-money of that annuity.

A verdict was found, by consent, for the consideration-money of both annuities.

Garrow and *Lawes* for the Plaintiff.

Erskine and *Dampier* for the Defendant.

Vide *Weddel* v. *Lynam*, ante vol. 1, 309.

Same day.

HENNELL *v.* FAIRLAMB.

A party cannot bring an action for what has been the object of a set-off in a former action by the Defendant against him; but if the set-off was more than sufficient to cover the demand in the former action, he may maintain an action for the surplus.

ASSUMPSIT for work and labour, as a warehouseman.

Plea of the general issue, and notice of set-off.

The Defendant had brought an action in the court of Common Pleas against the present Plaintiff; to which the latter had pleaded a set-off, and had obtained a verdict in consequence.

Lord KENYON. If the present demand was the object of the set-off in the former action, the present action cannot be maintained; the subject of it has been already disposed of.

Garrow for the Plaintiff stated, that that demand in the former action was 7*l*. 2*s*.; the set-off was

14*l*.

14*l.* 15*s*; and that the present action was brought for the surplus.

Lord KENYON. That certainly may be done.

The Defendant had paid money into court sufficient to cover the present demand; and had a verdict.

Garrow and *Jervis* for the Plaintiff.

Erskine and *Lawes* for the Defendant.

MURRAY and Another *v.* BUTLER.

Tho' the Plaintiff's counsel may have set out with only claiming the balance of a settled account, if he fails in proving it, he shall not be precluded from going into evidence to charge the Defendant with money had and received to the Plaintiff's use.

ASSUMPSIT for money had and received, and on an account stated.

Erskine, in his opening for the Plaintiff, said that the action was brought to recover the balance of a settled account, which the Defendant had admitted.

The witnesses failing in proving a settled account, *Erskine* was proceeding to examine, as to certain sums of money which had come to the Defendant's hands; when he was interrupted by *Garrow*, who objected: That as he had set out with only charging the Defendant with the balance of a settled account, he should confine himself to that.

Erskine contended, that though he did set out with charging the Defendant with a specific balance of money, having failed in proving that, he was not precluded from charging the Defendant with money belonging to the Plaintiff which had come to his

hands,

hands, and letting him discharge himself as well as he could.

Lord KENYON thought he might do so, and suffered the cause to proceed.

The cause was afterwards referred.

Erskine and *Lawes* for the Plaintiff.

Garrow and ——— for the Defendant.

ROGERS *v.* M^c CARTHY.

Monday, Feb. 24th.

The slip of paper on which underwriters take down the risques they insure, is not such an instrument as an action could be maintained upon. In order to enforce an undertaking of this nature, it must be on a stamped policy.

ASSUMPSIT by the Plaintiff, an underwriter, against the Defendant, a broker, for money had and received for premiums on a policy of insurance on the ship *Thomas* and *Mary*.

The cause had been tried before. and the Defendant had paid 10*l.* into court. The Plaintiff submitted to a nonsuit, and afterwards took the money out of court. He had not moved to set aside the nonsuit, but brought the present action to recover the whole sum he had before claimed, except the 10*l.*

It was objected: That having taken money out of court after having been nonsuited, and never having moved to set that nonsuit aside, he was barred from bringing a new action.

Lord KENYON said, it was a question of great difficulty and importance: but seemed inclined to think it was a bar: his Lordship however said, he would

would not decide it at *Nisi Prius*, but would reserve the point for the opinion of the court, and suffer the cause to proceed.

It was proved to be usual for underwriters to put down upon a slip of paper the risques they had taken in the course of the day; and it became important, in one stage of the cause, to ascertain the time when the risk in the present case had been taken, and the description of the ship; and the slip was produced.

One of the jury (which was a special one) said it was considered at *Lloyd's*, that the party was bound by that slip, though he never signed a policy; and that losses were frequently settled by persons who had taken the risque in that manner.

Lord KENYON said, that however a man might be bound in honour and good faith, which was the ground-work of all mercantile transactions, he certainly would not be bound in law by such an instrument. If he was to enforce his claim in a court of justice, he must produce a stamped policy.

A clerk of the Plaintiff's was called as a witness; and a book containing an alphabetical list of the risques taken by the Plaintiff, and the times when taken, was put into his hands; it was in his own hand-writing; and on his saying that he did not take those entries from original documents, but copied them from entries made by the Plaintiff in a book, in his (the Plaintiff's) own hand-writing kept by him, *Garrow* objected to the witness making use of the book.

Erskine

A witness may use a book containing entries not made from original documents, to enable him to state the time when such entries were made, but not so as to make such entries evidence.

Erskine said, he did not want to make use of it to make the entries evidence: he only wanted it to enable the witness to state that a particular entry had been made at a particular time.

Lord KENYON thought that it might be made use of for that purpose.

The Plaintiff had a verdict, subject to the opinion of the court on the point reserved.

Erskine, Adam, and *Warren* for the Plaintiff.

Garrow, Gibbs, and *Marryat* for the Defendant.

Tuesday, Feb. 25th.

ABEL and Another *v.* SUTTON.

After the dissolution of a partnership, one of the persons who composed the firm, cannot put the partnership name on any negociable security, even though such existed prior to the dissolution, or was for the purpose of liquidating the partnership debts, notwithstanding such partner may have had an authority given him to settle the partnership affairs.

THIS was an action brought by the Plaintiffs, as indorsees, against the Defendant as surviving partner of one *Poynter*, upon a promissory note for 685*l.* 11*s.* dated the 27th of *May*, 1799, and payable in six months after date, drawn by Messrs. *Horton* and Co. in favour of *Sutton* and Co. and indorsed in the partnership name of *Sutton* and Co. to the Plaintiffs.

The Defendant and *Poynter* had carried on business in partnership, under the firm of *James Sutton* and Co. On the 31st of *May*, 1799, the partnership had been dissolved, and notice of the dissolution published in the *London Gazette* of the first of *June*: and the defence was, That the note in question was an accommodation one, created after the disso-

dissolution of the partnership, though it bore date before; and the partnership name put on by *Poynter* alone, without authority from the Defendant; or that even if it existed prior to the dissolution, it had not been put into circulation until after. The indorsement, "*James Sutton* and Co." was in the hand-writing of *Poynter*; and it appeared clearly that it had not been made until the 28th of *August*, nearly two months after the dissolution of the partnership; but it was stated, and admitted to be the custom of trade, that when bills or notes had a long time to run, it was not usual to put them into circulation until near the time they became due, or when they had about the usual time of discountable securities to run.

Law, for the Plaintiffs, contended, that where a partnership had been dissolved, and one of the partners had authority given him to settle and liquidate the partnership accounts, and due notice to that effect was given (as in the present case in the same advertisement in the Gazette, which contained notice of the dissolution of the partnership) such partner had a right to use the partnership name in negociating bills or securities which existed previous to the dissolution, until the accounts were liquidated; and Mr. *Barnewall*, one of the jury (which was a special one) said, it was very customary for one partner to use the partnership name long after it was notoriously dissolved, in negociating the partnership securities, for the purpose of liquidating the partnership accounts, and winding up the concern;

and

and observed, that many bills could not be received if the partnership name was not upon them.

Erskine for the Defendant said, the declaration stated, that *Sutton* and Co. indorsed the note: it must therefore be shewn that the partnership existed at the time the note in question was indorsed; and he cited *Dixon* v. *Evans*, 6 Term Rep. 57, in support of this position.

Lord KENYON. If a fair bill existed at the time of the partnership, but is not put into circulation until after the dissolution, all the partners must join in making it negociable. The moment the partnership ceases, the partners become distinct persons: they are tenants in common of the partnership property undisposed of, from that period; and if they send any securities which did belong to the partnership into the world, after such dissolution, all must join in doing so. I even doubt much, if an indorsement was actually made on a bill or note before the dissolution, but the bill or note was not sent into the world until afterwards, that such indorsement would be valid.

Gibbs mentioned *Ellis* v. *Galindo. Doug. App.* 20.

In the course of the cause a witness was called who had been clerk to *Poynter*. He was asked if he did not know that *Poynter*, after the dissolution of the partnership, had put the partnership name on the bills antedated to the time previous to the dissolution.

Law objected to the question: he said that it assumed as a fact that bills had been antedated, without shewing that such in fact did exist.

Lord

Lord KENYON was clearly of opinion that the question was a legal one; and *Gibbs* mentioned the cases of indorsements by procuration; in which it was every day's practice to ask witnesses if bills had been indorsed by procuration, without producing any such.

It had been proved, that *Poynter* had received money for securities belonging to the partnership, which had been thrown into the general fund, and had been applied in liquidation of the partnership debts, after the dissolution:—and *Law*, in his reply, stated two positions in support of the Plaintiff's claim; 1st, That if bills existed before the dissolution of the partnership, and one of the partners had authority to settle and liquidate the partnership accounts, such partners had a right to put the partnership name upon such bills; and that a *bona fide* holder of such bill would have a right to resort to all the partners: 2dly, That if he put into circulation bills in the partnership name, upon which money had been raised, which was applied in liquidation of the partnership debts, it was money had and received to the use of all the partners, and all would be liable.

Lord KENYON (after observing that there was no evidence to shew that the money raised upon the bill in question had been so applied) expressed his most decided dissent to both positions: he said, it could never be allowed that any one might make another his debtor against his will: by that means a man's greatest enemy, by paying his debts, might make himself his creditor. The most mischievous and

and distressing consequences might ensue from such a doctrine. He had often ruled that it could not be done; and he was still of the same opinion. With respect to the other position, his Lordship said, When a man takes a partner, he takes him for better, for worse; he reposes confidence enough, and places himself sufficiently in the power of his partner during the partnership. To contend that this liability to be bound by the acts of his partner, extends to a time subsequent to the dissolution, was in his mind, a most monstrous proposition. A man in that case could never know when he was to be at peace, and retired from all concerns of the partnership, if one partner was to have the power of binding another long after the dissolution of the partnership. I am of opinion, said his Lordship, if a bill is sent into circulation after the dissolution of a partnership, that beyond all controversy, all the partners must join in the indorsement; and one by putting the partnership name cannot bind the rest.

The jury found a verdict for the Defendant.

Law, *Garrow*, and *Giles* for the Plaintiff.

Erskine and *Gibbs* for the Defendant.

Gregory *v.* Howard.

When a cause is referred, the arbitrator may be called as a witness to prove facts admitted before him as arbitrator.

Assumpsit on a promissory note.

Plea of the general issue as to all but 2*l.*; and as to that a tender.

The parties had been concerned together in the purchase of a field of potatoes, and other dealings; and the defence was, that all accounts between them had been settled.

The Plaintiff called a witness who had been an arbitrator, to settle the accounts between the parties.

The counsel for the Defendant objected to the witness speaking as to any communications made to him in the course of the arbitration.

Lord Kenyon. I have often given my opinion on this subject. Evidence of concessions made for the purpose of settling matters in dispute, I shall never admit; but facts admitted before arbitrators, I always shall; I shall, therefore, allow the arbitrator to be examined, and to speak to such matters of fact as were admitted by the parties before him.

Erskine and *Jervis* for the Plaintiff.

Garrow for the Defendant.

February 21.

LACLOUCH *v.* TOWLE.

Where, by the custom of the trade, a calico-printer is bound to take goods damaged in the printing, the mere circumstance of their being damaged confers no such property in them on him as to authorize him to sell them, unless the owner has elected that he should take them.

TROVER for a quantity of muslins and calicoes.

To prove the property in the Plaintiff, the evidence was, that one *David Payne* was a calico-printer; that he received the goods from *Stacie* and *Macdoual* for the purpose of being printed. It appeared to be the usage of the trade, that when goods were damaged in the printing, the printer was bound to take them; the goods in question had been damaged, and were sold by *Payne* to the Plaintiff, who proved the payment for them by a banker's check, and that it was customary to buy goods of this description from the printer.

The Plaintiff employed a person of the name of *Fox*, as his agent, to dispose of the goods: he delivered the goods to the Defendant, who was a warehouseman, to look at, for the purpose of purchasing them: he retained them for the right owner; it being suspected that the transaction by which *Fox* became possessed of them was fraudulent.

The Plaintiff's counsel first contended, that the usage being established, the mere act of damaging the goods without leaving any election in the owner, conferred a property on the calico-printer.

Lord KENYON said, that such a proposition could not be heard of; that it enabled the calico-printer

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by his own act to defraud the person employing him; that it should be open to the election of the owner to say whether he would take the goods in their damaged state, or not; and that unless his assent was given to the printer so disposing of them, any sale of them made by the latter should be void.

Erskine for the Plaintiff then contended, That the Defendant's having received the goods from the Plaintiff, could not defend himself by setting up a right of property in another, but was bound at all events to deliver them; and cited a case before Mr. Justice *Gould*, at *Maidstone*, to the following effect: A carrier had a parcel of goods delivered to him, to be carried from *Maidstone* to *London*. While the goods lay at his warehouse, a person came there, who said the goods were his, and claimed them from the carrier: the carrier said, he could not deliver them; but that if he was indemnified he would keep them, and not deliver them according to order. An indemnity was given; and the goods not being delivered according to order, the party by whom they were delivered to the carrier, brought an action against the carrier. Mr. Justice *Gould* would not permit him to set up any question of property out of the Plaintiff; and held, that he having received them from him, was precluded from questioning his title or shewing a property in any other person.

If a carrier receives goods to be carried, he cannot retain the goods, and put the consignor of the goods upon proof of his title to them.

Lord KENYON admitted the authority of the case cited as law, but that it did not apply to the present; that if the property of the goods was proved clearly to belong to other persons, who had sent them to *Payne* to be printed, that he should hold it to be a decisive answer to this action.

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This was proved, and the Defendant had a verdict.

Erskine and *Gurney* for the Plaintiff.

Garrow and *Marryat* for the Defendant.

Same day.

KING *v.* FRANCIS.

Where the character of the Plaintiff or Defendant on the record is attempted to be impeached in the cross-examination of the adversaries witnesses, if those witnesses deny the imputation intended to be conveyed, the party shall not be admitted to go into evidence of his character.

THIS was an action for adultery with the Plaintiff's wife.

In proving that the Plaintiff and his wife had lived happily together previous to the seduction, the counsel for the Defendant, in their cross-examination endeavoured to impute to the Plaintiff that he had been a dissipated person, had sold his furniture, and left his wife unprovided; but this was denied by the witnesses who were examined.

Gibbs called a witness, to prove that the Plaintiff was an industrious man, and of good character: the admissibility of this evidence was opposed by the Defendant's counsel. The Plaintiff's counsel contended, that it was admissible; as though in general cases, character was not matter of evidence, that in this action, the matters imputed to the Plaintiff went in mitigation of the damages, if not to the ground of the action; and as the Defendant had attacked the Plaintiff's character in the cross-examination of his witnesses, he should be allowed the privilege

privilege of vindicating it, and restoring himself to credit with the jury.

Lord KENYON said, That it was true in general, that at trials at *Nisi Prius*, the characters of the parties on the record was not matter to be examined into by evidence: that though the cross-examination of the Plaintiff's witnesses had been directed to impeach the character and conduct of the Plaintiff, he did not think that that authorized him to break through the rule of evidence, by going into evidence of character, as that character stood unimpeached by the testimony of the witnesses examined, who had denied the imputation intended to be conveyed. He was therefore of opinion, that the evidence was inadmissible.

Verdict for the Plaintiff.

Gibbs, and *Wathen* for the Plaintiff.

Erskine and *Garrow* for the Defendant.

ARDING *v.* FLOWER and BLACKHALL, Sheriffs of *London*.

A bankrupt is protected in his attendance on the commissioners, at a meeting for declaring a dividend after his last examination has been concluded, tho' only summoned verbally by the messenger.

THIS was an action on the case, against the Defendants, as the sheriffs of *London*, for an escape and false return.

The facts given in evidence were, that one *Chayter* being indebted to the Plaintiff in the sum of 34*l.* he sued out a bailable writ against him, which was delivered to the Defendants, as sheriffs.

Chayter had become a bankrupt in the year 1795, subsequent to which the Plaintiff's debt accrued: his last examination took place in *January* 1796, in which year he obtained his certificate.

In the month of *October* 1799, a dividend was advertised of his estate; the bankrupt had been authorized to collect some of the debts due to his estate: he received a verbal notice from the messenger under the commission to attend the meeting: he accordingly did attend the meeting pursuant to his notice, but he had no regular summons signed by the commissioners. While he was so attending, he was arrested at the suit of the Plaintiff. He appealed to the commissioners, who interposed; and on their representing to the officer that the Chancellor on a petition would commit him for a contempt, he permitted *Chayter* to go at large; and the sheriff being called on for a return, returned *non est inventus*; for which this action was brought.

The Defendant's counsel relied, that the attendance on the commissioners was necessary and usual, and that it afforded a protection from arrest.

For the Plaintiff it was answered, that the statute 5 *Geo.* II. ch 30, under which only the bankrupt could claim an exemption from arrest, privileged him for forty-two days only, or perhaps only until his last examination was finished: but that even, was he protected during his attendance on the commissioners, it could only be where he attended under a regular summons signed by the commissioners; whereas here his attendance was purely voluntary.

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Lord KENYON said, that the bankrupt was entitled to the protection of his person during his attendance on the commissioners acting under his commission: that he considered this protection as extending to all parties, and their witnesses attending on courts of justice; and as such he considered commissioners of bankrupt. With regard to the formality of the summons, he thought there was no ground of objection on that account, inasmuch as the bankrupt had had notice to attend from the messenger, and the commissioners had adopted his act.

Verdict for the Defendant.

Mingay and *Manly* for the Plaintiff.

Garrow and *Marryatt* for the Defendant.

Vide 8 Term Rep. 534. S. C.

IN THE COMMON PLEAS.

SITTINGS AFTER TERM AT GUILDHALL.

BEDFORD *v.* M^cKOWL.

February 25th.

In an action on the case for seduction, *per quod servitium amisit*, the Plaintiff is not confined to proof of loss of service only, but may go into evidence of the loss of comfort in the security of her child, and injury to her feelings as a parent.

THIS was an action on the case, for seducing the Plaintiff's daughter.

The Plaintiff kept an inn at *Colnbrook*; the daughter acted as bar-maid.

The Plaintiff's counsel were proceeding to examine witnesses as to the general good conduct of the Plaintiff's family, what other children she had, and how she was affected by the injury complained of.

 Shepherd,

Shepherd, Serjeant, for the Defendant, objected to their going into evidence of this nature: he said, the form of the action was for loss of service; and contended, that all the evidence should be confined to the inquiry, how far the Plaintiff was damnified by the loss of service.

Lord ELDON. The Defendant's counsel object that all evidence except that which applies to loss of service is inadmissible. In point of form, the action only purports to give a recompence for loss of service; but we cannot shut our eyes to the fact, that this is an action brought by a parent for an injury to her child: in such case, I am of opinion, that the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children, whose morals may be corrupted by her example.

His Lordship summed up to the jury accordingly; and they found a verdict for the Plaintiff, with 400*l.* damages.

Cockell, Serjeant, *Bailey*, Serjeant, and *Wigley* for the Plaintiff.

Shepherd and *Best*, Serjeants, for the Defendant.

COCHRAN

Cochran v. Retberg *et alt.*

Feb. 26.

Where there is a clause in a bill of lading, that the cargo shall be taken out in a certain number of days, or to pay demurrage, it means working days, not running days.

This was an action of *assumpsit*, brought by the Plaintiff, who was captain of a ship, called the *Dempster*, to recover a sum of money claimed as the demurrage on a cargo of goods shipped on board the Plaintiff's ship on a voyage from the river *Elbe* to *London*.

The declaration was on the bill of lading, which was in the usual form, to pay the freight, &c. The clause respecting the demurrage was a memorandum in the margin of the bill of lading in the following words: — "To be discharged in fourteen days, or to pay five guineas per day demurrage." After the vessel was discharged at the custom-house, the Defendants paid the freight, &c. but resisted the payment of the demurrage, on the following grounds:— The ship arrived in the river *Thames*, and was reported on the 9th of *December*. If the fourteen days were to be counted running days, the demurrage commenced on the 24th of *December*; and the vessel not beidg cleared till the 30th, the Plaintiff had of course a claim for six days' demurrage: but it was contended that the word "days," generally, meant working-days, and did not include *Sundays*, or custom-house holidays. The defendants then proved, that the 21st of *December* (*St. Thomas's* day) was a holiday; *Christmas-day*, and the three following

following ones were also holidays; and during those days, no goods could be landed at the custom-house; but it was proved that on those days goods could be taken out of the ship into the lighters.

Several witnesses were examined as to the usage whether the words "days," in the margin of the bill of lading, meant running days or working days; and the evidence was contradictory as to that point.

Lord ELDON. This action is brought to recover a sum of thirty-five guineas, which is claimed by the declaration, under a clause in the margin of the bill of lading: it is part of the special contract, and the Plaintiff has properly declared upon it as such. As, however, there is a doubt respecting its meaning, it is capable of being explained by the usage. If no evidence had been offered, but I was to decide on the clause itself, I should have been of opinion that it meant running days: if that was so, — if evidence of usage was not admissible, and the parties had made such a contract, they must abide by it, even though they could not perform it; as if the vessel had arrived on a holiday, and there had been holidays for the fourteen subsequent days.

As the law however stands, usage may be admitted to establish the meaning of the words used in the margin of the bill of lading; whether the words "days," used in it, means running days or working-days. If this was the case of inland-trade, this must mean working-days, as the law of the country prohibits working on such days as those which

which formed part of the fourteen days claimed by the Plaintiff to be allowed by the bill of lading in this case; but as the question now stands, it is a matter of general importance to have the opinion of a special jury of the city of *London* on the usage of trade with respect to instruments of this description. The words of the instrument are not "to be landed," but "to be taken out in fourteen days." She arrived on the 9th of *December*; the 15th was *Sunday*, and the 21st was an holiday. If the days are to be counted running days, it expires on the 23rd; if these two days and the holidays at *Christmas* are to be deducted, the goods being discharged on the 30th, it is in time.

The question therefore resolves itself into a question of usage; if it is left to the construction of law, I should be of opinion the Plaintiff ought to succeed: if the fact of usage is clearly made out, that the fourteen days mentioned in the bill of lading means working days, that is a construction which excludes *Sundays* and holidays at the custom-house; there must be a verdict for the Defendant.

The jury found a verdict for the Defendant.

Best, Serjeant, and '*Espinasse* for the Plaintiff.

Shepherd, Serjeant, for the Defendant.

Anderson v. Pitcher and Wife.

If a ship is warranted to sail with convoy from the place of rendezvous, she must receive her sailing instructions at that place, or the warranty is not complied with.

Assumpsit for money had and received by the Defendant's wife before her marriage with the Defendant.

The action was brought to recover back the sum of 284*l.* which had been paid by the Plaintiff, who had underwritten a policy on the ship *Golden Grove*, on a voyage to the *West Indies*, in consequence of the loss of that ship; and which he now sought to recover back, on the ground that he had paid a sum of money which he was not bound by law to do, the ship not having complied with the warranty.

The circumstances of the case were these:—The insurance was effected on the ship at five guineas *per cent.* "at and from *London* to any of the ports, the *West Indies*, *Jamaica*, and *St. Domingo* excepted, with leave to go to the place of rendezvous to join convoy, and warranted to sail with convoy for the voyage."

The *Golden Grove* was to have sailed with the fleet under Admiral *Christian*. The ships were to rendezvous at *Spithead*. The *Golden Grove* arrived there about nine o'clock in the morning of the 13th of *November*; but the captain was not then on board: he was on shore at *Portsmouth*. At day-break, in the morning of that day, Admiral *Christian* made the signal for sailing, and got under weigh, but left the

the *Trident* frigate, Captain *Osborn*, for the ships that did not weigh anchor with the Admiral: that on the 14th, all the ships then at *Spithead* who applied for them, had their sailing orders; on which day the captain of the *Golden Grove* enquired about sailing orders, but found they could not be granted to him until the ship was in sight. That the captain of the *Golden Grove* did not get on board his ship until one o'clock in the day of the 15th; at which time the *Trident* had got also under weigh: that both the Admiral's ship and the *Trident* were so far-a-head, that the *Golden Grove* did not come up with them until between 11 and 12 o'clock on the 16th, when the captain went on board the Admiral's ship, and got his sailing instructions. She was lost two days after.

The counsel for the Plaintiff contended, that the ship having been warranted to sail with convoy, that warranty had not been complied with, as at the time of her sailing, she did not constitute a part of the convoy, from her wanting sailing instructions; and that therefore the policy was void.

For the Defendant, it was relied upon by his counsel, that though he had not sailing instructions, it proceeded not from negligence, but from inability to come up with the convoy on the 15th; but that she actually had her sailing instructions on board at the time the loss happened, and during all the preceding time was under the protection of the convoy.

Lord Eldon. In this case the Plaintiff grounds

his

his right to recover on the non-compliance of the assured with the warranty. If the warranty has not been complied with, the Plaintiff has paid his money by mistake, and may recover it back. The important words in the policy are, "with leave to go to the place of rendezvous and join convoy, and warranted to sail from thence with convoy for the voyage."

Vid. Hibbert v. Pigore, Park Mo. 339.

As the law stands, a ship cannot be said to sail with convoy, unless she has her sailing instructions on board. It will be therefore necessary, in this case, to inquire, 1st, Had she any sailing instructions? and, 2dly, When did she obtain them?

It appears that the *Golden Grove* did not obtain her instructions until the 16th. It is contended by the counsel for the Defendant, that if the captain is prevented by bad weather from obtaining his sailing instructions at the time of sailing, that it will satisfy the policy.—I think not. He is bound to be there in time to take in his sailing orders, or he does not comply with the warranty. When then was he bound to take in his sailing orders? At *Spithead*, where the fleet rendezvoused, and from whence it sailed. If therefore you are of opinion that *Spithead* was the place of rendezvous, she had not her sailing instructions on board at the time of sailing; and the law is clear that she had not complied with the warranty: the Plaintiff is entitled to recover.

The jury found for the Plaintiff.

Best,

Best, Serjeant, and *Pell* for the Plaintiff, *Shepherd*, Serjeant, and *Giles*, for the Defendant.

Vide 2 *Bos.* and *Pull.* 164, *S. C.*

IN THE KING'S BENCH,

EASTER TERM, 25 GEO. III.

[*The case of the Proprietors of the* Trent *Navigation* v. Wood, *which was decided by the court of King's Bench, in* Easter *Term,* 25 Geo. *III. being referred to in the case of* Buller v. Fisher, *ante* 67; *and that of* Cook v. Field, *ruled by Lord* Kenyon *at* N. P. *sittings before* Michaelmas *Term,* 1788, *in the case of* England v. Bourk, *ante* 80; *and the case of* Cooper v. Booth, *in that of* Price v. Messenger, *ante* 196, *and none of them, I believe, being in print, I insert them in this place.*]

Proprietors of the Trent Navigation v. Ward.

This was an action of *assumpsit*.

The declaration stated that the Plaintiffs, as proprietors of the *Trent* Navigation, undertook to carry the Defendant's goods from *Hull* to *Gainsborough*: that in the river *Humber*, the vessel, on board which the Defendant's goods were, sunk, by driving against an anchor in the river; and the goods

goods were, in consequence of the accident, considerably damaged. That the Plaintiffs repaired the damage the goods had sustained, and sent them home to the Defendant: and the breach was, that the Defendant refused to pay the money the Plaintiffs had expended in the recovery of the goods. There was also a count in the declaration for money had and received, which was for freight. At the trial the Plaintiffs were nonsuited.

A rule having been obtained, to shew cause why the nonsuit should not be set aside, it came on to be argued on this.

The counsel for the Defendant being desired to begin,—*Cowper* contended, that the Defendant was not liable to pay this money: there was no pretence to say that the accident happened from the act of *God;* for it was expressly stated and proved, that the accident was occasioned by the negligence of the persons on board a barge in the river, in not having his buoy out, to mark the place where his anchor lay. A great deal of evidence was adduced at the trial to prove this; but, as between the carriers and the owners of the goods, the misconduct of a third person is immaterial, since a remedy lies over against the party so offending. The Plaintiffs would have been liable, had the goods been totally lost; and therefore a *fortiori* shall answer this damage themselves.

Bower, on the same side. The question is, Whether the Plaintiffs, as carriers, are liable for the damage done to the goods in question? The law in

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all cases, throws the burden, when there is a loss, upon a common carrier, even if the goods are taken by robbery, where it is impossible for him to save them; and the reason is, to prevent any collusion between him and the thief. He is certainly liable in all cases, except the two, of accidents happening by the act of *God*, or of the King's enemies. Here is no pretence for either. A damage taking place by a natural accident that could not be foreseen, may be called the act of *God*; but this arose from the misconduct of a third person, and cannot therefore come within the meaning of that expression.

Bearcroft for the Plaintiffs. This is a question that concerns all common carriers: they are the *bailees* of goods; and as they get a profit by this undertaking, they are also liable to answer for losses, if the smallest degree of negligence is proved; but in the present case there was no possibility of seeing or knowing of the anchor that did the mischief, and therefore the accident happened from an inevitable necessity; which though it may not come up to the precise idea of the act of *God*, is yet such a necessity as affords a justification to the Plaintiffs.

Plomer on the same side. There is no neglect proved on the part of the Plaintiffs; and as to the remedy over against a third person, it must first be determined who are immediately answerable for the loss, before it can be known who is entitled to this remedy. It was in evidence at the trial, that there is considerable danger in the voyage from *Hull* to

 Gains-

Gainsborough, and that it is therefore usual for the owners of the goods to insure them; and as there was no insurance in this case, but only the price of the freight, which has been paid into court, I contend that it was only a special acceptance on the part of the Plaintiffs, and therefore that they are not liable for the loss occasioned by the accident which has happened. It is like a voyage to the *East Indies*; and as there is a great risque in all sea-voyages, it would be very unreasonable to make a party liable generally to answer the loss where he has not stipulated for that purpose. The evidence at the trial of an usage to insure goods for this voyage, varies the case very much from that of a common carrier, where there is no insurance; therefore as it appears that there was a special acceptance in this case, the Plaintiffs are not liable to answer the damages done to the goods.

Lord MANSFIELD asked, If there was any case which made distinction between a land and a water-carrier? And, none being mentioned, *Cowper* in reply, put a case of an *East Indiaman* in the Downs running down another vessel; and said that the owners of the vessel run down, would certainly have an action against the other for the damage; and would also be liable as common carriers to their employers. That this accident happened in the river *Humber*, clearly *infra corpus comitatus*; and therefore was not a sea-voyage. A custom to insure was certainly proved; but because it is usual, a man is not obliged to do it; and a carrier will be equally answerable. If a man pleases, he may insure his goods

goods by the *Chester* waggon; but if he does, still the waggoner must be liable in case of a loss.

Lord MANSFIELD. This is certainly a sea-voyage. It is a general question, and no case has been cited exactly in point; but it is clear that the carrier is liable in all cases, except for accidents happening by the act of *God*, or by the king's enemies. The act of *God* is a natural necessity, and inevitably such as winds, storms, &c. The case of a robbery is certainly very strong, but not a natural necessity; and in this case there is an injury by a private man, within the reason of the instance of robbery; yet I think the carriers ought to be liable. There is some sort of negligence here; for as the buoy could not be seen, there should have been, on that account, a greater degree of caution used.

Willes, Justice, of the same opinion

Ashhurst, Justice. The general rule is, that the carrier is liable in every instance, except for accidents happening by the act of *God*, or the king's enemies; but another rule is now attempted to be set up; which is, that the carrier ought not to be liable where negligence is imputable to him; but no case has been cited to prove this doctrine; and I think that good policy and convenience require the rule to be adhered to which has hitherto prevailed. It will naturally lead to make carriers more careful in general. If this sort of negligence were to excuse the carrier, when he finds that an accident has happened to goods from the misconduct of a third person, he would give himself no farther trouble about the recovery of them; nor do I think

that in this case the carrier is entirely free from every imputation of negligence. His not seeing the buoy ought to have put him upon enquiring more minutely about the anchor.

Buller, Justice. This case is very different from those relied upon by the Plaintiffs. Two grounds have been made for the Plaintiffs: first, That upon general principles of law they are not liable; and, secondly, That they are not liable, because this was a special acceptance, which excluded the risques of the sea; but for this there is no colour at all. It was proved at the trial that it was usual to insure; but that does not shew that the carrier is not liable where there is no insurance: the merchant is not bound to insure, nor does that vary the obligation. Neither is it to be presumed, that because the price of insurance is low, this risque is excluded when not insured: the carrier knows the degree of danger, and proportions his premium accordingly.

As to the general principle, there is no distinction between a land and a water-carrier. In the case of a robbery, the carrier is subject to force which he cannot resist; yet he shall be liable. In this case, I think there was a degree of negligence in point of fact; but the negligence in point of law was sufficient.

Rule discharged.

Vide *Forward* v. *Pittard*, 1 Term Rep. 27.

SITTINGS

SITTINGS BEFORE MICHAELMAS TERM, 1788.
CORAM LORD KENYON.

Cook *v.* Field.

This was an action for words, in themselves actionable, with special damage laid.

The Defendant justified the truth of the words.

The Plaintiff proved no special damage.

Lord Kenyon observed, that every count in the declaration had a *per quod*, and seemed to doubt whether, as the Plaintiff had proved no special damage, evidence of the words only would support the declaration so framed; but upon its being suggested to him at the bar, that if the words were in themselves actionable, it was not necessary to prove special damage; and that proving or not proving the *per quod*, made no difference, even as to costs. His Lordship assented to the position.

Erskine, for the Plaintiff wanted to bring forward evidence as to conversations subsequent to the time of the commencement of the action; and said, it was laid down in *Bull. N. P.* 7, that after having proved the words laid in the declaration, it was allowable to give such evidence, to shew the malicious intention with which they had been spoken; but

Lord KENYON said, that was with the exception of such words as might be themselves the objects of separate actions.

The words stated in the declaration were, for charging the Plaintiff with being accessary to a felony; and *Bearcroft* laid it down as a principle, that though the principal thief had previously been acquitted of the felony, it would be competent for the Defendant in this cause to go into evidence to prove his guilt; because what had passed between other parties could not affect him: and he mentioned it as a common case, that where the principal has been convicted, it is nevertheless on the trial of the accessary, competent to the Defendant to prove the principal innocent.

To both these positions Lord KENYON assented; and added, that where a Defendant justifies words which amount to a charge of felony, and proves his justification, the Plaintiff may be put upon his trial by that verdict, without the intervention of a grand jury.

The Plaintiff had a verdict, with *500l.* damages.

TRINITY TERM, 25 GEO. III. K. B.

COOPER *et alt.* *v.* BOOTH.

THIS was a writ of error from the Common Pleas.

It was an action of trespass: the Plaintiff declared for breaking and entering his dwelling-house, bursting locks, &c. and rummaging and throwing about his goods. The Defendant pleaded the general issue; and the jury found a special verdict, to the following effect:

That *Booth*, the Plaintiff, in the original suit, was a dealer in tea in the city of *Westminster;* that the Defendants *Cooper* and *Cameron* were officers of excise for collecting the duties on tea, &c.; that in *January*, 1783, *Cameron* applied to the Commissioners of excise for a warrant to search the house of *Booth*; that the Commissioners being satisfied with the reasonableness of his suspicion, did grant a warrant, impowering him and *Cooper* to enter into *Booth*'s house, and seize all run tea which should be there found fraudulently concealed; that the Defendants did, in consequence of this warrant, in the day-time, enter into the Plaintiff's house, and broke open a lock, which the Plaintiff had refused to open, and rummaged his goods; but that they found no tea.

Judgment had been given for the Plaintiffs in the Common Pleas, and a writ of error on the judgment having been brought, it came on to be argued on this day.

Friday, April 29, 1785.

Wood, for the Plaintiffs in error. The question is, Whether the officers are justified in what they have done, not having found any tea? and it will turn on the construction of the 13th section of stat. 10 *Geo.* I. ch. 10, which enacts, "That in case "any officer, &c. shall suspect that any tea, &c. is "fraudulently concealed with intent to defraud, "&c. upon oath made to the commissioners of ex-"cise, setting forth the grounds of his suspicion, it "shall be lawful for them to authorize the officer to "enter such house by day or night, and if by night, "with a peace-officer, and seize and carry away "such goods;" and gives a penalty of 100*l.* upon those who shall obstruct the officer's search.

I contend, from the words of the act, that the officers were justified in this case, though the search was unsuccessful: the act meant to impower an officer to search upon reasonable grounds of suspicion. It would be strange then, that an officer who acts upon reasonable grounds should be deemed a trespasser, notwithstanding any subsequent event may make him so; besides, the legislature did not mean to impower him to proceed merely from his own discretion. The commissioners, or a justice of peace, as the case may be, are to exercise their judgment on the causes of suspicion alledged, and grant the warrant, if they think fit; and therefore there is no danger in entrusting such a power in the hands of

of the officer. If he does nothing in the exercise of it which exceeds the authority given him by the warrant, he cannot be a trespasser; and in this case he has not.

The inconveniences to the revenue would be very great, if officers were not to be justified, though they find nothing in their search. It often happens that the officer is resisted at the beginning, and the goods in the mean time removed; so that a man may have the best grounds of suspicion, and yet may not find any thing to confirm him. It is manifest, from the mention of the penalty for those that impede the officer, that the act meant to indemnify him throughout: an action of this sort was never attempted where there was a reasonable ground of suspicion: the true ground of it is malice and vexation on the part of the officer.

Lord *Hale*, 2 P. C. 150, says, the officer will be justified *in eventu* only: this is merely a *dictum*, and is unsupported by any authority, *Bostock* v. *Saunders*, *Black.* Rep 912, seems to have been determined upon this opinion of Lord *Hale*.

The writ of assistance, mentioned in stat. 12 *Car.* II. ch. 19, is general and directed to all the king's subjects, requiring them to aid and assist in the collection of the king's duties; but that is no authority in the present case, for there the officer acts entirely upon his own suspicion, without the intervention of any magistrate whatsoever.

If an hue and cry be raised, a man may justify the arrest even of an innocent person. *Hawk.* P. C. 77,

77, and 2 *Hale*, P. C. 104; for the raiser of such hue and cry is answerable in damages to the party injured; and therefore *a fortiori*, the officer is justified here, where there were strong grounds of suspicion.

Lord Mansfield. *Bostock* v. *Saunders* has not been acquiesced in; there have been contrary determinations: the distinction I have always taken is this, that to justify under a writ of assistance, the officer must find the goods he searches for; but a warrant will justify without. If there appear any malice or undue motives in the officer, he will undoubtedly be liable.

Plomer for the Defendant in error. The verdict states, that the officer having a ground of suspicion, went to the commissioners, and obtained a warrant; but it does not appear what the particular ground of the officer's suspicion was.

The act of parliament requires that it should be set forth; but as the officer did not state it to the jury at the trial, the court cannot judge whether the suspicion was well founded or not. It was said in *Bostock* v. *Saunders*, that if the officer had given in evidence any circumstance to prove a reasonable ground of suspicion, he would have been justified.

Buller, Justice. It has been resolved by a majority of all the judges, that the officer is not obliged to declare the grounds of his suspicion, lest accidents should happen to him.

Plomer. It was thought in *Bostock* v. *Saunders*, that the officer ought at the trial to produce in evidence the grounds of his suspicion.

Arguments

Arguments of convenience and policy ought to have as much weight on one side as the other. The safety and peace of the trader ought to be considered; and it would be monstrous to permit his house to be searched at all hours by an officer who will not declare his reasons for suspecting him. The arguments from an analogy do not apply to the case, and the warrant is not alone sufficient to bar this action.

I contend, first, That when a warrant is granted to the party immediately applying for it, it is not enough as a justification to say that the warrant was granted, but it is necessary to state the grounds upon which it was granted.

Secondly, Whenever an authority is given by persons holding a limited jurisdiction, then it is always necessary to justify the act, by stating the particular authority upon which it is grounded.

1st, If an execution is to be executed against one who is party to the suit, it is enough to shew the writ; but if against a third person, it is necessary to produce the judgment upon which it issues. There must be a complete justification, or else the act will be a trespass; for an incomplete justification is as none at all; and therefore the question is, Whether the justification set up in this case is complete?

Mr. *Wood* says, *Hale* cites no authority for his opinion; but his *dictum* is an authority of itself. He says that the officer is justifiable if goods are found; if not, that the party who made the suggestion is punishable. From this it is clear that he took a distinction between the person executing the warrant, and

and the person applying for it. In the case of the writ of assistance, every body is commanded to assist, and therefore ought to be under the same protection as the officers themselves; but it has been determined, that any one acting under it, is liable to make satisfaction *in eventu* to an innocent person.

Secondly. There is a distinction between warrants issued by magistrates having a general, and those who have only a limited jurisdiction.

The commissioners have a very extensive authority, and therefore the courts have confined them very strictly in the exercise of it; and if an officer justifies under the act, he must bring himself in every respect under the description pointed out by the statute, and therefore producing the warrant is not sufficient; he must go into all the particulars which give validity to it: *Nichols* v. *Walker*, *Cro. Car.* 394. This was the case of a distress made by a parish-officer in a place that maintained its own poor; and the court said, "The warrant will not excuse, because the justices have but a particular jurisdiction, and therefore different from the case of a warrant issued by virtue of a general jurisdiction:" —— v. *Boucher*, *Cro. Jac.* 81; *Terry* v. *Huntingdon*, *Hard.* 480, are to the same effect. From these cases, I contend that the officer was bound to shew the causes of his suspicion, that they might appear upon the general issue to be reasonable under stat. 7 *Jac.* I.

The officer being in this case the first mover of the business, stands in the situation of persons applying

plying upon their own ground; and is very different from the case of one not privy to the whole of the transaction. Upon these reasons, I contend that the officer ought to have put in issue the grounds of his suspicion, as he derives his power from a limited authority.

Unless this action can be maintained, no other can; for an action on the case will not lie, as the injury is immediate; therefore the court must now determine the broad question, Whether the officer by force of his suggestion to the commissioners, behind the back of the trader, is to be justified in entering his house at all events? and whether he is to be without a remedy? for it is clear that if an action, is not to be supported against the officer, it cannot be supported at all.

Lord MANSFIELD asked, If any instance was remembered by the bar, where an action was brought against the officer, no goods having been found?—but nobody recollecting any,

Wood in reply said, That as to the objection that no grounds of suspicion were stated by the officer, the act never meant that this should be enquired into by a jury; for the commissioners are expressly empowered to judge of the reasonableness of such suspicion.

The arguments of convenience are answered by the act of parliament. The legislature has thought fit to empower the officer to enter the houses of tradesmen by day or night; and the commissioners from whom he is to derive his authority, are made the judges of the causes of suspicion.

It

It has been objected also, That the proceedings whereby the house becomes liable to be searched, are behind the back of the party; but if he was to be summoned, it is notorious that this would defeat the purposes of the statute.

The cases cited do not apply. The officer is in general justified by his warrant, and here there is something tantamount to a judgment; namely, the judgment of the commissioners, upon the grounds of suspicion offered to them. In the case of the writ of execution, the officer need not shew the party the grounds upon which the writ issues; and this case is similar.

In the next, with regard to the rate, the place where the distress was made was extra-parochial, and therefore out of the limits of the jurisdiction of the officer; but that is not so here; for the verdict states, that the house where, &c. was within the limits of the commissioners of excise.

In the third case, the plea was defective; for nothing was shewn which brought the matter within the jurisdiction of the magistrate. Had the officer here alledged generally divers grounds of suspicion, there would have been some analogy between the cases; but he states his particular grounds pursuant to the act.

In *Terry* v. *Huntingdon*, the commissioners had exceeded their jurisdiction; but that was not the case here.

Another objection is, that the officer ought to have stated his causes of suspicion, as they were traversable and ought to have been tried by the jury;

 but

but upon the true meaning of the act, this is not a question traversable or triable by a jury, as the magistrate is empowered to judge, and to grant the warrant in his own discretion.

Here there is something more than the mere naked warrant stated; for it appears by the verdict to have been granted upon some ground; namely, the oath of the party applying.

Mr. *Plomer* says, that it is impossible to bring any other action than this; but if the information is found to be false or malicious, it may be the subject of an action upon the case, against the person who makes the suggestion; for it is certain, that wherever the authority of the law is perverted and abused, an action of this kind is maintainable; but nothing of this sort appears upon the special verdict.

The court took time to consider; and Lord MANSFIELD desired the counsel to see if there was any authority in the books for the *dictum* of Lord *Hale*, above mentioned; and whether it had been ever held that an officer was liable to an action of trespass after an unsuccessful search.

Upon the day after, *Plomer* mentioned a case in 2 *Wils*. 291, &c. State Trials, 321, as somewhat in point with the *dictum* of Lord *Hale*. *Thursday, June 9.*

Lord MANSFIELD delivered the opinion of the court to the following effect:

This case comes before the court by writ of error from the Common Pleas; the judgment there was upon special verdict; and upon the special verdict the case appeared to be exactly the same with that of

Bostock

Bostock v. *Saunders*, in *Blackstone* and *Wilson*'s Reports; and as upon the case the court of Common Pleas in this cause gave judgment without hearing it argued, there is no occasion to state the case found by the verdict, because it is the same as in *Bostock* v. *Saunders*: there is no difference as to the facts of the cases; both are truly stated.

The great authority of those who gave the opinion has made us deliberate, and turn the matter over and over again in our thoughts; but after all the deliberation we have taken, we cannot bring ourselves to concur in it.

We think the excise-officer cannot be guilty of a trespass, either as procuring or executing this warrant. If he procured or executed this warrant maliciously or corruptly, on the ground of such motives, he would be liable to a special action on the case.

The question depends entirely upon an act of parliament, the 10th *Geo.* I. ch. 10, sect. 13. By that act, a duty is imposed upon an officer of excise who has grounds of suspicion, to lay such grounds upon oath before a proper magistrate described in the act; namely, a commissioner of the excise in town, and a justice of peace in the country. A duty is also imposed upon such magistrate, to exercise his judgment upon the grounds of suspicion; and if he thinks them sufficient, and not otherwise, he is bound to grant a warrant.

The judgment of the magistrate upon an *ex parte* representation, warranted by oath, is decisive as to the issuing the warrant to search. The commissioners

ers undoubtedly had authority in this case: the warrant is clearly legal when it is issued; the execution is clearly legal when it is executed; and it seems a solecism to say that the regular execution of a legal warrant can be a trespass, though a bad motive in doing a legal act, or in executing a legal process, might be actionable, as I have before said in respect of such motive.

Two objections have been made; first, That the event of not finding such goods as are searched for, avoids the warrant, in respect of the excise-officer; and he ought to be considered as a trespasser by relation, acting under no authority.

This repeals the act of parliament: the act is entirely adapted to the case of *probable* circumstances; the objection requires *positive certainty;* the officer does not say that he knows that goods are in the house, but that he suspects that they are. If a man by warrant is arrested for suspicion of felony, it is not necessary that he should be found guilty on his trial, in order to justify the arrest.

The writ of assistance is not applicable here; it is no warrant; it is general, and leaves all and every part of the execution of it to the discretion of the customhouse-officers; and there is a positive clause which is material in the act of *Car.* II. and which makes the justification depend upon the event of finding the goods (suppose a warrant in the case of stolen goods) and the justification to depend on the event of finding them. It is a positive condition to prevent abuses, that the procurer shall run the risque

of the secret; and it was introduced with a political view, to prevent improper conduct in the officers, and not a consequence drawn from principles; but we give no opinion upon this point: the act upon which the present question depends, was made expressly for the good of the public, that the parties might proceed safely upon reasonable grounds of suspicion; and the check against abuses is in the first instance the judgment of the magistrate: for suppose the goods actually in the house when the information was given, and taken out of it just before the warrant was executed, is it possible to say that the excise-officer, within the meaning of the act, can be a trespasser? It is adding a clause which the legislature purposely avoided, with the example of such a provision in the 12 *Car.* II. before their eyes.

The second objection is, That if it is too much to say the validity of the warrant depends upon the finding of the goods or not, yet that the grounds of suspicion must be laid before, and the sufficiency of them made appear to the jury who are to try the cause.

This equally repeals the act; the excise officer may be the only person who knows from whence his suspicion arises, and he cannot in an action against himself give in evidence a reasonable suspicion; reasonableness of suspicion would have so much latitude to a jury, that no officer would be safe: the act was made to remedy these inconveniences; the oath of the officer is made evidence of the truth of the

fact;

fact; and the probability of the suspicion duly left to the magistrate to judge of. If the magistrate thinks the ground of suspicion sufficient, the warrant ought to issue; if not, it ought to be refused.

The regulation made by the act is agreeable to the principles of justice and policy; the officer is not merely a party (though interested if the goods are found) but he acts as a public officer in the execution of his duty; and if he acts *bona fide*, he ought to be saved.

This act points out the way in which he may be saved: he must swear to the grounds of his suspicion, take the opinion of the magistrates as to their sufficiency, and obtain a warrant to authorize the search. It is not left to the discretion of the officer; but there are several steps which would be necessary if it was requisite, either that the goods should be found, or that the officer should be obliged to produce the grounds of his suspicion before a jury. Where an officer acts *mala fide*, the act will not protect him: he is punishable by an action upon the case, and therefore we cannot help being of opinion, though we differ from great authority, that he is not a trespasser: that the execution of a legal warrant is not a trespass, but that the party injured must bring his action upon the grounds of bad motives; for this is an action of trespass, and not an action to try whether he acted from bad motives or not; therefore the judgment of the court of Common Pleas must be reversed.

Judgment reversed.

By

By this determination the case of *Bostock* v. *Saunders*, 3 Wils. 434, was overruled: the authority of it has since been recognized. Vide 1 Term Rep. 535; and 2 *Bosanq.* and *Pull.* Rep. in C. P. 100.

G. Woodfall, Printer,
Paternoster-row.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

HOME CIRCUIT.

LENT ASSIZES AT KINGSTON, 40 GEO. III.

BENTON *one*, &c. *v.* GARCIA.

March, 1800.

If an attorney brings an action against a client, and part of his demand is for money advanced to his client's use, and the remainder for business done, which requires a bill to be delivered and no bill has been delivered, he shall not be allowed to divide his demands at the trial, and recover for the money advanced.

THIS was an action of *assumpsit*, brought by the Plaintiff, who was an attorney. The declaration was for work and labour, money paid, with the other common counts.

The action was brought to recover a sum of 9*l.* 18*s.* 10*d.*

The circumstances of the case were these:—The defendant having been arrested at the suit of one *Wylie* in his lifetime, had been liberated on giving his warrant of attorney, payable by instalments. *Wylie* died, and an instalment being in arrear, *Read* and *Copland*, his executors, entered up judgment on the warrant of attorney, and took the defendant in execution for the whole sum unpaid, amounting to 25*l.* besides poundage, &c. While * he was so in custody, he employed the plaintiff as his attorney, to effect his discharge. He took out a summons before a judge; and by consent an order was made, that the defendant *Garcia* should be discharged out of custody, on payment of the instalment then due and the costs; and the judgment to stand as a security for the future arrears. [*150]

The order being drawn up, *Read* and *Copland*'s attorney gave him the amount of their demand as follows; viz.

	£	s.	d.
Instalment - - - -	1	18	6
Costs of judgment - - -	3	3	0
Ca. sa. Warr. &c. - - -	0	15	0
Attending summons - -	0	3	4
	£5	19	10

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BENTON v. GARCIA.

Garcia, the defendant, being unable to pay this sum, the plaintiff, in order to liberate him from confinement, paid this sum for him, and he was accordingly discharged; the defendant having, previous to his discharge, settled the amount of the sum in which he was indebted to the plaintiff, being the above sum of 5*l.* 19*s.* 10*d.* together with 1*l.* 11*s.* 6*d.* costs due to the plaintiff, for attendances on the judge, and other business done in procuring the defendant's discharge; which sum the defendant promised to pay, together with a sum of one guinea as a gratuity to the officer.

This money not being paid, the plaintiff sued out a writ against the defendant, without having delivered any bill.

[151] A summons was taken out for a particular of his demand; when he gave in the following:—

Read v. *Garcia.*	£	*s.*	*d.*
Paid instalment and costs to plaintiff's attorney	5	19	10
Costs for procuring your discharge - -	1	11	6
Officer - - - - - - - -	1	1	0
Poundage - - - - - - -	0	5	6
Gratuity - - - - - - - -	1	1	0
	£ 9	18	10

The counsel for the defendant contended, that the plaintiff should be nonsuited, on the ground of no bill having been delivered; that by the words of the statute, 2 *Geo.* II. ch. 23, sect. 23, "no attorney can commence an action for the recovery of any fees, charges, or disbursements, at law or equity, until one month after the delivery of a bill, signed as directed by the statute;" that the demand in this case, was money paid as a disbursement in a cause of *Reed* v. *Garcia*, and so was within the statute; and cited *Winter* v. *Payne*, 6 Term Rep. 645.

For the plaintiff it was contended, that this case was not within the statute; that it was for money paid to the use of the defendant to the plaintiff's attorney in that action, and which the master could not tax, as it was a gross sum upon which he could exercise no discretion; and that the statute only required the delivery of such bills as could be taxed. The case of *Winter* v. *Payne*, was for drawing and engrossing an affidavit of debt, which was the commencement of a cause;

[152] that the defendant having settled the account with the plaintiff, and admitted the demand, the plaintiff might recover in the

the count for an account stated; but that, at all events, supposing the part for business done was rejected, on account of no bill having been delivered, the plaintiff might recover on the count for money paid to the defendant's use.

HEATH, Justice. I am of opinion that the objection should prevail to the plaintiff's recovering in this action; the plaintiff might have split the action, and sued for the money paid to the plaintiff's use only; but he has joined it with a demand made as an attorney, and that makes it necessary that the bill should have been delivered. If a bill had been delivered, the defendant would have had the month to consider, whether he would not admit the part of the demand for the money advanced, and tax the bill. The case of *Winter* v. *Payne* is in point. He now cannot split his demand, as that would be multiplying actions: and having joined the demands, and the delivery of the bill being necessary for part of it, he must be nonsuited.

Best, Serjeant, and *Lawes* for the plaintiff.

Garrow and *Onslow* for the defendant.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN

KING'S BENCH, EASTER TERM, 40 GEO. III.

SITTINGS AFTER TERM.

May 29th.

In actions of debt, to recover the penalties against a sheriff's officer for taking more than is allowed by act of parliament on an arrest, if the plaintiff fails in proving his case so as to entitle himself to the penalties, he may recover on the count for money had and received, the overplus paid above what is allowed by the statute.

LOVELL v. SIMPSON.

THIS was an action of debt under the statute 32 *Geo.* II. ch. 28, brought by the plaintiff to recover from the defendant, who was a sheriff's officer, the amount of several penalties given by that statute, for taking more money on an arrest than is allowed by that act.

The plaintiff gave in evidence, That having been arrested by the defendant, on a writ marked for bail for 500*l.*, he gave bail to the sheriff; that the defendant charged five guineas for the bail-bond and civility money; and that two guineas and a half were actually paid.

By the stat. 32 *Geo.* II. ch. 28, the officer is allowed to take the sum of half a guinea for the bail bond, and no more.

[*154] * The declaration contained the common money-counts in debt, for money had and received, and money paid, as well as the counts for the penalties.

The plaintiff having omitted to subpœna the witness to the bail-bond, and the extortion being laid to have been committed in taking the money for the bail-bond, in all the counts for the penalties, the plaintiff was under the necessity of abandoning those counts. His counsel then proposed to go on the count for money had and received.

Mingay,

1800.

Lovell v. Simpson.

Mingay, for the defendant contended that the plaintiff should be nonsuited, and not be permitted to go into evidence on the money counts. That the action having been brought for the penalties for the breach of a statute, and the plaintiff having failed in establishing the offence, should not be allowed to go for the money taken by the officer, in the form of money had and received; inasmuch as the money, if improperly or illegally taken, subjected him to the penalties which the plaintiff had failed in establishing.

Lord Kenyon ruled, That the plaintiff might recover on the money-counts; that it was money extorted from the plaintiff, by the defendant, taking an advantage of his situation, and under a claim of right, which the plaintiff was unable to resist. That the claim arose under a settled rule of law, which entitled a party to recover back money extorted from him, which was the case here; and the circumstance of the Defendant's thereby incurring a penalty could not vary it.

Verdict for the plaintiff for the money paid, deducting the sum allowed by law to the defendant. [155]

Erskine and *Onslow* for the plaintiff.

Mingay for the defendant.

Long v. *Moore*, Sittings after Hilary Term at *Guildhall*, *Feb.* 18, 1790. Assumpsit by the indorsee of a bill against an acceptor; after the acceptance, the word "date" was inserted in the place of "sight;" in which form it had originally been drawn. The acceptor being thereby discharged, the plaintiff wanted to go on the common counts, and offered in evidence another bill, drawn by the same drawer on the defendant, for the same amount, but not accepted. Lord Kenyon ruled that it could not be done; nor could the plaintiff recover at all against the acceptor, (the defendant) for he was liable only by virtue of the instrument; which being vitiated, his liability was at an end.

Clarke *v.* Bradshaw and Coghlan.

May 30th.

Where money has been paid on account of two defendants, an acknowledgment by one within six years shall prevent the statute of limitations from attaching as against the other. *Quere?*

Assumpsit for money paid, laid out, and expended to the defendants' use.

Pleas,—1st, The general issue; and 2dly, the statute of limitations, by the defendant *Bradshaw*.

The defendants had formerly carried on business as merchants, in *Cork*, in *Ireland;* and had become bankrupts. While they carried on trade the plaintiff had given his guarantee to Messrs. *Hamersly*, the bankers, to secure any advances made to the defendants in consequence of their intercourse

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CLARKE v. BRADSHAW and COGHLAN.

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course *with *England*. The bankers had made advances for their use to the amount of 1800*l.*; but the plaintiff had not been called upon on his guarantee, until after the bankruptcy of the defendants, when he paid the money, and now brought his action against them for money paid to their use.

Coghlan, one of the defendants, let judgment go by default; and the plaintiff relied upon a letter, written by him in the course of the preceding year, as containing promises to pay, and an acknowledgment sufficient to bind *Bradshaw*, the other defendant.

Gibbs, for the defendant, contended, that this promise was of no avail, as it was made at the time when the defendant was a bankrupt; and that, at all events it could not bind the other defendant.

Erskine. This was a debt contracted by the two defendants while in partnership, and on their joint account. In the case of *Whiting* v. *Whitcomb*, *Doug*. 629, it was held, that in an action on a joint note, and the statute of limitations pleaded, a promise by one of the parties was sufficient to take the note as to both, out of the statute. And in a subsequent case of *Jackson* v. *Fairbarn*, 2 *Hen. Black*. 340, where there was a promissory note by two, and one of them had become bankrupt, and the holder of the note had received a dividend on it within six years, it was adjudged that this should prevent the other maker of the note from availing himself of the statute of limitations. That what was the case where the demand arose under an express contract, as in the case of notes, equally applied to the implied contract, where the money was paid on account of two.

If a defendant upon whom a demand is made, says, that he is protected by the length of time the money has been due, it is an acknowledgment of the debt, and shall charge him.

*Lord KENYON said, he had some doubts about the point, and would reserve the case.

The plaintiff's counsel then said, they had other evidence of an acknowledgement by the defendant *Bradshaw* himself; and called up a witness, who was clerk to the attorney for the plaintiff. He proved, that on the defendant's *(Bradshaw)* being arrested, in a conversation with him on the subject of the arrest, *Bradshaw* said, that the plaintiff had paid money for him twelve or thirteen years ago, but that he had since become a bankrupt, by which he was discharged, as well as by law, from the length of time since the debt had accrued.

[*157]

Gibbs contended, that this evidence was not sufficient to charge the defendant; that it was against the sense and spirit of

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CLARKE v. BRADSHAW and COGHLAN.

of the statute that it should be so: that the plea of the statute of limitations itself, admitted the existence of the debt, but claimed a discharge by reason of the statute; and that it would be depriving the party of the protection of the statute, if the claim of that protection should be construed into an admission of the debt, and be sufficient to charge him.

Lord KENYON said, he was not now to put a construction on the statute of limitations for the first time. It had been decided that any acknowledgment of the debt was sufficient to take the case out of the statute; and he was bound to hold it so.

The plaintiff had a verdict.

Erskine, *Garrow*, and *Marryat* for the plaintiff.

Gibbs, *Percival*, and *Beauclerk* for the defendant.

SITTINGS AFTER TERM AT GUILDHALL.

[158]

DENNIS v. MORRICE.

June 6th.

Nothing shall dispense with the want of notice, to the drawer of the non-payment of a bill of exchange, but the circumstance of their being no effects of the drawer in the drawee's hands; it is inadmissible evidence that the drawer was not damnified from the want of notice.

THIS was an action of *assumpsit*, to recover the amount of a bill of exchange drawn by the defendant *Morrice*, on *Siardet* and Co. in favour of *Barbier Bobbier* and Co. and indorsed to the plaintiff.

The defendant was a foreigner; he had no notice of the non-payment by the acceptors; but being asked to pay the bill he said, "I am not acquainted with your laws; if I am bound to pay it, I will."

Gibbs, for the plaintiff. The money was in the hands of *Siardet* and Co. at the time of the demand made on the defendant; the plaintiff might have had it from them at any time. The principle upon which notice has been held to be necessary to be given to the drawer, is, that he may receive a prejudice from the want of notice, as he might take his effects out of the hands of the drawee; if therefore I can shew that no prejudice whatever arose to the drawer from the want of notice, that shall dispense with the necessity of it. If the plaintiff is not allowed to go into this kind of evidence, the drawer must hold the money received from the payee, as the consideration of the bill, without the possibility of its ever being recovered.

Lord KENYON. I cannot hold the law to be so. The only case in which notice is dispensed with, is where there are no effects of the drawer in the drawee's hands. This would be extending the rule still further than ever has been done, and [159]

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opening new sources of litigation, in investigating, whether in fact the drawer did receive a prejudice from the want of notice, or not.

The evidence was therefore rejected, and the plaintiff was nonsuited.

Gibbs and *East* for the plaintiff.

Law and *Adam* for the defendant.

COLE, Executor of COLE, v. SAXBY.

If the plaintiff to a plea of infancy replies a new promise after full age, and the evidence is of a promise to pay "when the party is able," the plaintiff must prove that the defendant was of ability; but it is sufficient to give evidence of ability, from ostensible circumstances and appearance in the world.

ASSUMPSIT for money paid by the testator to defendant's use, with the usual money counts.

Pleas,—1st, Non-assumpsit; 2d, Infancy; 3d, The statute of limitations; *viz.* That the defendant did not undertake or promise within six years before the commencement of *this* action.

Issue was joined on the first plea: to the second there was a replication that the defendant had made a new promise after his coming of full age: and to the third, the plaintiff replied, that the testator, in his lifetime, sued out a writ for the same cause of action, and soon after died: and that the plaintiff, as his executor, within a reasonable time after his death, sued out the writ upon which the present action was founded; and that though the * defendant did not promise within six years before the commencement of this suit, yet that he did promise within six years before the commencement of the testator's action.

[*160]

Rejoinder—That the testator's writ was not sued out as it purported (that is, on the last day of Trinity Term last past) but on the 12th day of *October;* and that the defendant did not undertake or promise within six years before the 12th of *October*.

Surrejoinder—That the defendant did undertake within six years before the 12th of *October*.

Upon which issue was joined.

The defendant *Saxby* and the testator had been joined in a bond for securing an annuity to one *Duckett*.

Under this bond the testator had paid the whole amount; and the present action was brought to recover the moiety of the money so paid.

To prove the replication to the second plea, that the defendant had promised to pay after attaining full age, the plaintiff

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COLE v. SAXBY.

tiff called a witness, who stated that he had called on the defendant, respecting the money paid by the plaintiff's testator, on account of the bond. In the course of conversation, that the defendant said, he had had very heavy losses in trade; but that he would pay his part when he was able.

Lord KENYON. This is not an absolute promise to pay; it is, "when he is able." I remember a case before Lord MANSFIELD, in Staffordshire, in which he was of opinion, that it was incumbent on the plaintiff to shew that the defendant was of ability to pay at the time of the action brought. [161]

Where the whole of a bond has been paid by one obligor, and he brings assumpsit against his co-obligor for contribution—query, Is non-assumpsit, infra sex annos, a good plea? or is not there the same limitation to such a demand as to the bond itself?

The plaintiff's counsel then called a witness to prove to that effect. The defendant's counsel cross-examined him as to his particular knowledge of the defendant's circumstances; whether he knew the state of his debts, or how he was circumstanced.

Lord KENYON said, it was not necessary to enquire further than his ostensible appearance and his circumstances, as they were open to the observation of the world; that if appearances were that he was of sufficient substance and ability, he should hold it sufficient to satisfy the promise.

The plaintiff did give such evidence, and satisfied his lordship, who held it to be sufficient.

Lord KENYON then addressing himself to the defendant's counsel, said, that the pleadings had gone to a considerable length, and as the plaintiff had made out such a case as entitled him to recover, it might be unnecessary to observe on it; but that he had considerable doubts whether the statute of limitations attached on the case. The demand arose under a deed; and there had been a case in which a very considerable law authority had been of opinion, that such a debt was entitled to the same limitation as the deed itself.

The plaintiff had a verdict.

Gibbs and *Cowley* for the plaintiff. [162]

Erskine and *Madocks* for the defendant.

Vide *Besford* v. *Saunders*, 2 Hen. Black. 116. *Cowell* v. *Edwards*, Bos. and Pull. 268.

But where an action is brought for *Tort* against two defendants, and the whole of the damages are levied against one; it was decided in this case, that the party who had so paid the whole of the damages could not call on the other defendant in an action for money paid to his use. The cases of contribution are confined to joint demands arising on contracts. *Merryweather* v. *Nixon*, 8 Term. Rep. 186.

CASES

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

COMMON PLEAS, EASTER TERM, 30 GEO. III.

FIRST SITTING IN TERM.

May 15th.

MALE *v.* ROBERTS.

When the cause of action accrued in Scotland, and infancy pleaded, the defendant must shew that infancy is a legal defence to the demand, by proving the law of that country in that respect.

ASSUMPSIT for money paid, laid out, and expended to the use of the defendant; money lent and advanced, with the other common money counts.

Plea of the general issue.

The case, as opened by the plaintiff's counsel, was, that the plaintiff and the defendant were performers at the *Royal Circus*. While the company were performing at *Edinburgh*, in *Scotland*, the defendant had become indebted to one *Cockburn*, for liquors of different sorts, with which *Cockburn* had furnished him; not having discharged the debt, and it being suspected that the defendant was about to leave *Scotland*, *Cockburn* arrested him, by what is there termed a writ of *Fugé*: the object of which is to prevent the debtor from absconding.

[164] The defendant being then unable to pay the money, the plaintiff paid it for him; and he was liberated. The present action was brought to recover the money so paid, as money paid to his use.

The defence relied upon was, that the defendant was an infant when the money was so advanced.

Lord ELDON. It appears from the evidence in this cause, that the cause of action arose in *Scotland*; the contract must be therefore governed by the laws of that country where the contract

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MALE v. ROBERTS.

contract arises. Would infancy be a good defence by the law of *Scotland*, had the action been commenced there?

Best, Serjeant, for the defendant contended, that the contract was to be governed by the laws of *England*; in which case the plaintiff could recover for necessaries only. That at all events it should not be presumed that the laws were different; and as it appeared that the debt did not accrue for necessaries, the plaintiff could neither recover on the counts for money paid, or for money lent to an infant.

Lord ELDON. What the law of *Scotland* is with respect to the right of recovering against an infant for necessaries, I cannot say; but if the law of *Scotland* is, that such a contract as the present could not be enforced against an infant, that should have been given in evidence; and I hold myself not warranted in saying that such a contract is void by the law of *Scotland*, because it is void by the law of *England*. The law of the country where the contract arose, must govern the contract; and what that law is, should be given in evidence to me as a fact. No such evidence has been given; and I cannot take [165] the fact of what that law is, without evidence.

The plaintiff failed in proving his case, and was nonsuited.

Cockell, Serjeant and —— for the plaintiff.

Best, Serjeant for the defendant.

SITTINGS AFTER TERM AT WESTMINSTER, IN THE COMMON PLEAS.

LEIGH *v.* WEBB.

June 4th.

In an action for a malicious prosecution, in which the plaintiff charges the defendant with having imposed on him the crime of felony, by reason of which he was imprisoned, and on production of the information before the

THIS was an action of malicious prosecution.

The first count of the declaration stated, that the defendant having suspected that the plaintiff had feloniously stolen some casks, his property, had procured him to be imprisoned, under a warrant obtained under such charge, without any probable cause. There were three other counts in the declaration; in all of which it was charged, that the defendant imposed on him the crime of felony, and caused him to be imprisoned, &c.

Plea of not guilty.

The plaintiff was a publican, and dealt with the defendant as his brewer; the casks in question had been sent into the plaintiff's

1800.

Leigh v. Webb.

justice, there is no charge of felony, though the warrant was to arrest the plaintiff for felony, the evidence does not support the declaration, and the plaintiff shall be nonsuited.

plaintiff's house with ale; and when they became empty, they had been sent to the *house of a person of the name of *Lister*. The defendant having obtained a search warrant, on the suggestion of his casks having being stolen, he found them in *Lister's* possession, and then procured a warrant from *Bow-street*, under which he took the plaintiff into custody. He was brought before the justice there, who committed him for further examination, from *Saturday* till the *Monday* following.

[*166]

The plaintiff called the clerk of the public office in *Bow-street*, who produced the information which contained the above statement of facts: but the information contained no direct charge of felony in terms against the plaintiff; but the warrant which the magistrates had issued, grounded on that charge, and under which the plaintiff had been apprehended and committed for further examination, was "on suspicion of having feloniously taken and having in his possession casks, the property of the defendant."

If a party makes a complaint before a justice of peace, which the justice conceives to amount to a felony, and issues his warrant accordingly to arrest the party complained against, and the facts do not amount to felony, no action for a malicious prosecution will lie against the party who made the complaint.

Lord Eldon. Upon this evidence, I am of opinion that the plaintiff must be called. The plaintiff in every count of his declaration, except the first, complains that the defendant imposed the crime of felony on him; and that count varies from the information. Does the evidence correspond with the case the plaintiff has put upon this record? There is no charge of felony contained in the information; it contains a state of facts certainly not amounting to felony, but for which an action of trover could be maintained. The defendant having lost his property, states the facts to the magistrate; *upon which he is to form his judgment. If the highest criminal judge of the land was, by mistake of judgment, to conceive that to be felony which did not amount to that offence, and to commit the party complained against, would that subject the party complaining to an action of this sort? I am of opinion it ought not, and that the plaintiff must be nonsuited.

Nonsuit.

[*167]

Cockell, Serjeant, *Shepherd*, Serjeant, and *Barrow*, for the plaintiff.

Bailey and *Best*, Serjeants, for the defendant.

Anderson, Administrator, v. May.

Where an attorney has reg ularly

ASSUMPSIT to recover the amount of an atttorney's bill, for business done by the testator in his lifetime.

The

1800.

ANDERSON, Administrator, v. MAY.

The attorney had, some time previous to his death, delivered a regular bill to the defendant: no notice had been given to produce it; but the plaintiff proved that a bill had been so delivered, and offered a copy of it in evidence.

Heywood, Serjeant, for the defendant, contended, that this could not be done: that there was no more settled point at *Nisi Prius*, than that a copy cannot be given in evidence, unless there has been notice to produce the original.

It was answered by *Shepherd*, Serjeant, for the plaintiff that the paper offered was not a copy of the bill delivered, but itself an original; both it *and that delivered to the defendant, being transcripts from the attorney's books. That in the case of notices to quit, it was the constant practice to give in evidence a copy of the notice to quit, served on the defendant, without giving any notice to produce the original.

delivered a bill signed, he may give in evidence a copy of his bill as delivered, without giving the defendant notice to produce that delivered to him.

*[*168]

Lord ELDON said, that he was of opinion the paper offered in evidence was admissible, though no notice had been given to produce that delivered to the defendant, as he considered both as originals.

Verdict for the plaintiff.

Shepherd, Serjeant, and *Marryatt*, for the plaintiff.

Heywood, Serjeant, for the defendant.

Vide *Jory* v. *Orchard*, 1 Bos. and Pull. 39.

HOLLAND *v.* HOPKINS.

If plaintiff delivers a particular of his demand, under a Judge's order, "for goods sold and delivered to the defendant," he cannot go into evidence of a demand for goods of the plaintiff sent to him to be sold, as agent for the plaintiff, and for which he has received the

THIS was an action of *assumpsit*, for goods sold and delivered, with the common money-counts.

The defendant took out a summons for a particular of the plaintiff's demand, and the following was given in:

Holland v. *Hopkins*.

"This action is brought to recover l. being so much "money due and owing on an account settled and balanced "for horses, the property of the plaintiff, sold and de"livered before the 11th day of *September*, 1797. £.

*"And a further sum of l. for horses sold and de"livered by the plaintiff and his servants to the defendant, "on or about the 11th day of *September*, 1797. £. "

[*169]

The defendant paid money into court, sufficient to cover the demand on the account stated.

The plaintiff gave in evidence the sending of several horses from

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HOLLAND v. HOPKINS.

value, and recover that value as money had and received.

from the country to the defendant's yard, where they were sold by the defendant, as his agent. About the 11th of *September*, 1797, they balanced their accounts, and the defendant's was then found in arrear, in a sum of money equal to that which the defendant paid into court.

After the account had been so settled, on the 11th of *September*, the plaintiff sent other horses to the defendant, who sold them as before, and received the money. This constituted the second article in the bill of particulars, which the plaintiff sought to recover.

It was contended by the defendant's counsel, that the plaintiff could not recover on this evidence, within the particular as delivered in by him: that the demand to which the plaintiff's evidence applied, was for money had and received, being the price of the horses sold by the defendant for the plaintiff, and the price of which he had received: whereas the particular was not for money had and received, but for goods sold to the defendant by the plaintiff: whereas no such transaction had ever taken place.

The plaintiff's counsel contended, that the only use of the [170] particular being to apprize the defendant of the nature of the plaintiff's demand,—that the same degree of accuracy was not required in it as in pleading. That here the demand did arise from the sale of horses, and was therefore a sufficient intimation to the defendant for what the plaintiff meant to go: but that, at all events, the money being paid into court generally, they would apply that money to the second article of the particular, and go on the account stated for the balance.

Lord ELDON said, he was of opinion, that under the particular, the plaintiff could not recover: that the use of the particular was to apprize the defendant for what demand the plaintiff meant to go, that he might direct his proof accordingly, and not be taken by surprize at the trial; and that the plaintiff should not mislead the defendant, by giving in one thing as his demand, under a Judge's order, and starting another at the trial. That it was evident here that the plaintiff could only recover (after taking the money out of court) on the count for money had and received: but was the defendant apprized of that by the particular? Certainly not. He was told, the demand was for horses sold and delivered by the plaintiff and his servants to the defendant, this was a demand on a sale to the defendant himself; it was a different contract,

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HOLLAND v. HOPKINS.

contract, and tended to take the defendant by surprize. In that point of view, he thought the plaintiff ought not to be allowed to go into any evidence of it.

With respect to the plaintiff's right to apply the money paid into court to the count for horses sold and delivered, and to go now for the balance of the account stated, his Lordship added, [171] I think he cannot now do so, as he has given no evidence whatever of any horses sold by him to the defendant; his evidence has only gone to the count for the account stated; and I shall therefore hold, that it is upon that count only to which the money paid into court can be applied.

The plaintiff was therefore nonsuited.

Cockell and *Shepherd*, Serjeants, and ——— for the plaintiff.

Best and *Bailey*, Serjeants, for the defendant.

Vide 2 *Bos.* and *Pull.* 243. *S. C.*

SITTINGS AFTER TERM AT GUILDHALL, IN THE COMMON PLEAS.

PARK *v.* MEARS.

It is not necessary that the subscribing witness should see the obligor sign and seal the bond; it is sufficient if, after he has signed and sealed it, the witness is requested to put his name to it, in the presence of the obligor, and it is then stated that the obligor had executed it; and if he does so put his name to it, he is a good witness to prove the execution.

THIS was an action of debt on bond.

Plea of *Non est factum.*

To prove the execution of it, the plaintiff called the subscribing witness, a Mr. *Hearn.*

He proved that being in *Ireland* at the time the bond bore date, and where it appeared to be executed, he was called into the *Mayoralty-house,* in *Dublin.* That while he was waiting in the antichamber, an attorney of his acquaintance came out with the defendant on his arm, and asked him to sign those papers for his friend *Mears.* The bond *had in fact been executed by the defendant *Mears,* in an adjoining room, and subscribed there by another attesting witness; but he was perfectly acquainted with the hand-writing of *Mears,* recognized his signature, and subscribed his name to the bond as a witness in *Mears's* presence.

It was also proved, that the defendant had, at a subsequent time, admitted his execution of the bond.

Bailey, Serjeant, for the defendant, contended, that this [*172] was insufficient evidence to prove the issue, that it was the defendant's

1800. defendant's deed. He contended, that in all cases of bonds, the subscribing witness must necessarily be called, to prove the actual execution of the bond by the obligor; that in this case the witness had not seen the obligor do any act of execution; that if it was executed in the adjoining room, and there subscribed by the other witness, the execution was complete, and *Hearn*, the witness, putting his name to it afterwards, could not make him a subscribing witness. That as to the subsequent acknowledgment of the obligor, that was not sufficient evidence upon this issue; and had so been decided.

HOLLAND v. HOPKINS.

Vaughan, Serjeant, contended, that the whole was one transaction, which took place at the time of the execution of the deed. That it was not necessary for the subscribing witness to see the obligor actually sign and seal the deed at the time; that an acknowledgment at the time when the deed was executed, and the witness called upon to sign his name, was sufficient; and had so been held.

[173] Lord ELDON said, he had doubts whether it was admissible and sufficient evidence of the execution of the deed; but that, at all events, he thought it sufficient evidence to go to the jury when coupled with the defendant's admission.

The jury found for the plaintiff.

Vaughan, Serjeant, and *Park* for the plaintiff.

Bailey, Serjeant, for the defendant.

Bos. and Pull. 217. In the next Term, *Bailey*, Serjeant, moved for a rule *Nisi* to enter a nonsuit; but the Court held the evidence of the execution sufficient, considering the whole as one transaction.

Ley v. *Ballard*, et alt. Sittings after Hilary Term, 30 *Geo.* III. at *Guildhall*.

Debt on Bond. One defendant let judgment go by default; *Ballard*, the other defendant, pleaded *Non est factum*.

There were two witnesses to the bond.

They were called; but neither of them saw it executed by the defendant *Ballard*.

The defendant's counsel contended, that they were entitled to nonsuit the plaintiff, as there was no proof of the execution by the subscribing witnesses.

Per Lord KENYON. The subscribing witness to a bond must be called to prove it; if they disavow having seen it executed, other persons who saw it executed, or can prove the party's hand-writing, may be called. So if the subscribing witnesses prove contrary to what their attestation purport, namely, that the party did not execute it, it is open to the party to establish the instrument by other evidence. This was done in the case of *Jolliff*'s will.

In the principal case, the plaintiff proved the hand-writing of *Ballard*; and that he had been heard to say, that he had done so, and was afraid he would be obliged to pay it.

Lord

Lord KENYON held this to be sufficient; and the plaintiff had a verdict.

* Vide *Abbott* v. *Plumb*. *Doug*. 216.

Laing v. *Raine*. 2 *Bos*. and *Pull*. 85.

Grellier v. *Neale*, *Peake* N.P. Cas. 146. To prove a partnership-deed the plaintiff's counsel called the subscribing witness: she said, She did not see the deed executed, but that *Neale*, the defendant, brought it to her, and desired her to put her name to it as a subscribing witness; which she did. This was held to be sufficient evidence of the execution by *Neale*. [*174]

1 *Espin*. N. P. Cases, *Powell* v. *Blackett*, 97.

SEDLEY v. ARBOUIN, Executor of WEST, deceased.

Where a person is sent over from Ireland, under a warrant from the Secretary of State for Ireland, charged with any offence, and is committed to prison until he can be brought before a Judge, and the warrant is left with the gaoler, it is such a commitment and warrant as the prisoner is entitled to a copy under the *Habeas Corpus*, after it has been demanded.

THIS was an action of debt, brought against the defendant, as the executor of *Henry West*, deceased, to recover the amount of two penalties under the *Habeas Corpus* Act.

West, the deceased, in his life-time, had been the keeper of the *Poultry Compter*.

By the *Habeas Corpus* Act, 31 *Car*. II. ch. 2. sect. 2, it is enacted, "That if any officer, gaoler, &c. shall not within six hours after demand, deliver a true copy of the commitment of any prisoner in his custody, he shall forfeit for the first offence 100*l*., and for the second offence 200*l*., and be made incapable of holding his office."

Under this clause of the statute the present action was brought; the plaintiff, by his declaration, complained, that being in the custody of *Henry West*, then keeper of the *Poultry Compter*, he had demanded a copy of the commitment or warrant under *which he was held in custody; which the said *Henry West* had neglected and omitted to give, pursuant to the statute; and the offences were laid distinctly in the different counts of the declaration, as committed on two different days. [*175]

The circumstances of the case were these:—A trader, of the name *Nowlan*, having become bankrupt, and being suspected of having secreted property to a considerable amount, particularly three bank notes, to the amount of 1000*l*. each, and he being then in custody, under a committal by the Commissioners on his last examination, for not having answered to their satisfaction; his assignees having reason to believe that those notes were in the possession of the plaintiff, *Nowlan's* wife, and some other persons who were then in the city of *Dublin*, they made an application to the Duke of *Portland*, as Secretary of State, who sent his official letter to *Dublin*; in consequence of which the plaintiff and the others were arrested, and sent

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to *Newgate* there; from thence they were transmitted to *England*, under the following warrant from Lord *Castlereagh*, the Secretary of State for *Ireland:*

"*By the Right Honourable Lord* Castlereagh, *Chief Secretary to the Lord Lieutenant and General Governor of* Ireland.

"THESE are, in His Majesty's name, to authorize and "require you, to receive the bodies of *John Luther* "*Yates, Davenport Sedley* (the plaintiff) *Michael Morris,* "and *Sarah Nowlan,* now prisoners in the gaol of *Dub-*
[176] "*lin,* and to carry them to *London;* and upon your ar-"rival there, to carry them before the Lord Chief Jus-"tice of His Majesty's Court of King's Bench of *Eng-*"*land,* in order to their being tried for the offence with "which they stand charged. In the due execution "whereof, all Mayors, Sheriffs, Justices of the Peace, "Constables, and all others His Majesty's Officers, civil "and military, and loving subjects whom it may con-"cern, are to be aiding and assisting to you, as there "shall be occasion.

"Given at His Majesty's Castle of *Dublin,* this 12th day of *June,* 1799.

"*To Mr.* Wm. Shee, *and his Assistants.*"

In pursuance of this warrant, the prisoners were brought to *London,* in the custody of Mr. *Wm. Shee,* to whom the warrant was directed, and arrived there on the 21st of *June,* 1799.

On their arrival in *London,* they were brought to the *Poultry Compter.* The keeper refused to receive them at first; but afterwards, a city constable being procured by *Shee,* the prisoners were then received by *West,* the keeper, and with them was left the warrant, above stated, of Lord *Castlereagh.*

On the evening of that day (the 21st) *Davenport Sedley,* the plaintiff, demanded a copy of the warrant of committal. He was put off till the next morning: the next morning he again demanded it; and it was not delivered till the day following (the 23d); on which day a copy was delivered by *West,* the keeper.

[177] The plaintiff's cause of action was grounded on these two refusals of the copy of the warrant, as entitling him to the several penalties of 100*l.* and 200*l.* for the first and second offence.

Upon this evidence, the counsel for the defendant con-

tended

tended, that the action could not be maintained: That this was not such a committal as required a copy of the warrant, being merely for safe custody until the plaintiff could be brought before the Chief Justice of *England*, pursuant to the warrant: That it could not be deemed a committal under the warrant, as Lord *Castlereagh*, the Secretary of State for *Ireland*, could have no power or authority to commit to an *English* gaol: That if he was to be deemed to be therefore in custody under this warrant, it was illegal, and the grievance should have been the object of an action for false imprisonment, and was not sufficient to sustain an action for a breach of the *Habeas Corpus* act: but that if it was to be considered as a warrant to which the plaintiff was entitled to a copy, that it being delivered to him on the 23rd, and his having received it, was a waiver of the offence.

Lord ELDON. This is an action of debt on the *Habeas Corpus* Act; an act made for the protection of the liberty of the subject,—a protection which it affords beyond any other act in the statute-book; it therefore calls for the greatest attention from the Judge and from the Jury who try the cause; and so scrupulously has this statute been observed, that this is the first action on the act which has been tried within my time, or within my memory.

The first provision of the act is, that gaolers shall make speedy returns to writs of *Habeas Corpus*. The clause of the statute in question, commands him within six hours after demand, to give to the prisoner a copy of the warrant of his commitment and detainer. It is in order that he may be advised, Whether the offence for which he stands committed, entitles him to be bailed by the laws of the land? [178]

The law, therefore, on this subject is this:—Was the plaintiff in custody under a warrant of commitment and detainer or not? If he was not,—if there was no warrant; I am of opinion the action should be false imprisonment against the gaoler; but if he was in custody under any such warrant of commitment or detainer, the gaoler is liable in this action.

With respect to offences committed here and in *Ireland*, the law is the same; the charge is made and the offence tried in the county where the offence is committed; and the magistrates act within their own jurisdiction. The King is the great Magistrate of both countries; his power is executed by his Secretary of State; he puts it in force by sending over the

 party

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party arrested, by his warrant to the magistrate of that county where the offence has been committed. Under this power, Lord *Castlereagh* issued the warrant in question; it was a proper, wise, and legal exercise of that power which he enjoyed as Secretary of State; the offence was committed in *England;* it must be tried in *England;* and the offenders must
[179] be transmitted here for the purpose of trial; and the warrant was the authority under which he was brought, and under which he was detained in custody.

How then are the facts? *Shee* arrives in *London* on the 21st of *June;* he applies to the *Poultry Compter* to lodge his prisoners there; the turnkey refuses to receive them, without other authority; a city constable is called and the plaintiff is then received into the custody of *West,* the keeper, with no other charge than what appears from Lord *Castlereagh's* warrant; which warrant is left with the gaoler, and which he receives. Is it to be said, This was not a warrant of commitment and detainer? Is the gaoler, after so receiving it, to question its legality, as a defence to a breach of the *Habeas Corpus* Act? I am of opinion it was a warrant of commitment and detainer; that the prisoner was entitled to a copy of it; and that the offence is complete.

It has been said that the offence has been waived by a subsequent delivery and acceptance of a copy on the 23d. I am of a different opinion. If the copy is refused at one time, the delivery at another will not satisfy the statute.

The jury found a verdict for the 100*l.* penalty.

Cockell, Serjeant, and ——— for the Plaintiff.

Shepherd and *Best,* Serjeants, for the Defendants.

Vide Lord *Campden's* argument in the case of *Entick* v. *Carrington,* 11 State Trials, 316.

Rex v. *Kendall* and *Roe,* 1 *Salk.* 347. 1 Lord *Raymond,* 65.

[180] Sir *Wm. Wyndham's* case, 1 *Stra.* 2.

Rex v. *Florence Hennessey,* 1 *Burr,* 642.

Sayre v. Lord *Rochford,* 2 *Black.* Rep. 1165.

Rex v. *Wilkes,* 2 *Wils,* 150.

SAUNDERSON *v.* JACKSON and HANKIN.

A trader who is in the habit of delivering printed bills of parcels, to which his

THIS was an action on the case, for not delivering to the plaintiff a quantity of gin.

The defendants were distillers, and the plaintiff a dealer in spirits.

The

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SAUNDERSON v. JACKSON and HANKIN.

The plaintiff proved,—That being in want of gin, he applied to the defendants, to purchase some. That the defendants agreed to sell him 1000 gallons at 7*s.* per gallon; that he then gave an order to that amount, and a bill of parcels was given to him in the following words:—

name is prefixed, delivers one containing the quantity and price of the article, it is a good note in writing within the statute of frauds, particularly if it is referred to by a subsequent letter.

"*London, Dec.* 1799.
"Bought of *Jackson* and *Hankin*, Distillers,
"No. 8, *Oxford-Street.*
"1000 gallons of gin, 1 in 5, at 7*s.* . . . 350*l.*"

Part of the bill was printed; but the words "1000 gallons of gin, 1 in 5, at 7*s.* 350*l.*" was in writing.

The plaintiff did not immediahely call for the gin; and in about a month, the plaintiff received the following letter from the defendants:—

"Mr. *Saunderson.*

[181]

"Sir,

"We wish to know at what time we shall send you "part of your order: we shall be obliged for a little "time for delivery of the remainder. Must request "you to return our pipes.

"Your hnmble servants,
"*Jackson* and *Hankin.*"

This was the evidence of the purchase of the gin by the plaintiff. There had been a considerable rise in the article, and the defendants refused to deliver it; and now set up as a defence, that this being a contract for the sale of goods to be delivered in future, was void for want of a note, in writing, under the statute of frauds.

It was contended by the defendants' counsel, that the statute required some note or memorandum in writing of the bargain, to be made and signed by the parties or their agents: That here the bill of parcels was not itself the contract; it was not signed by the defendants; and was only evidence of a prior contract not reduced into writing.

Shepherd, Serjeant, for the plaintiff contended that there was a sufficient memorandum within the statute of frauds: that the printed name in the bill delivered by the party himself was a sufficient signing to satisfy the statute, as the bill of parcels contained the quantity and price, which were the essential parts of the contract; and that it was so considered by the defendants themselves was obvious from the letter, wherein it was

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SAUNDERSON v. JACKSON and HANKIN.

[*182]

was referred to as *the agreement, pursuant to which the gin was to be delivered.

Lord ELDON said he was of opinion there was a sufficient note in writing within the statute. There was no necessity to have the name put in any particular place: an agreement for the sale of lands, beginning, "I, *A. B.* agree," &c. was held to be sufficient within another clause in the statute of frauds requiring a note in writing. That in this case, it appeared the defendants had their bills of parcels printed, and their names prefixed: that he thought a man who delivered his bills of parcels, with his name printed, might be said to sign by his name printed, as well as by it written; and that such was sufficiently signed. At all events, he should direct the jury so to consider it, particularly coupled with the letter, wherein the agreement was recognised.

Verdict for the plaintiff.

Lens, Serjeant, and *Lawes* for the Plaintiff.

Shepherd and *Best*, Serjeants, for the Defendants.

PULTNEY, Bart. v. KEYMER, *et alt.*

If a broker advances money, and gives his acceptances on the credit of goods lodged in his hands, the owner cannot demand them without a full indemnity, and giving his counter acceptances, or those of any other person, to the amount of those given by the broker, and becoming payable at the same time, is not a sufficient indemnity in law.

[*183]

THIS was an action of trover for a quantity of sugar.

Sir *William Pultney*, the plaintiff, was the proprietor of an estate in the *West Indies:* he employed a house in *London*, of the firm of *Petrie* and *Campbell*, as his merchants or agents, to whom consignments were made of his property from thence; and *the sugars in question had been so consigned to them.

The defendants were brokers, and had advanced and given their acceptances, on account of the sugars which were deposited in their hands, to the amount of 18,000*l.*

While the sugars were in the defendants' hands, and before they were sold, they received a notice from the plaintiff not to sell them; and that he would indemnify them from any demand on account of the sugars, or any advances they had made.

The acceptances the defendants had given, on account of *Petrie* and *Campbell*, were not then due.

Lord ELDON asked the plaintiff's counsel, if they meant to contend, That where goods are lodged in the hands of a broker by giving him notice, they could turn him into a warehouseman?

Serjeant *Shepherd* said he meant to contend that they could prevent him from selling.

On

On receiving the notice, the defendants said, they did not know Sir *William Pultney;* that they had received the bills of lading indorsed to them by *Petrie* and *Campbell,* and had paid the duties; and that they would sell the goods, unless paid their money. The witness answered, they must know Sir *William Pultney,* who was the proprietor of the sugars; that he would pay them the money advanced, on an account being furnished; but he admitted, that he then said nothing about the sums for which the defendants were under acceptances.

1800. PULTNEY *v.* KEYMER, *et al.*

Lord ELDON. This is the case of a consignment of *West India* property. *Petrie* and *Campbell,* the agents of the plaintiff, are the consignees; they employ the defendants as their brokers. It is necessary to advance considerable sums for payment of the duties, and other expences; these sums are advanced by the defendants, who also accept bills drawn on them by *Petrie* and *Campbell;* and *Petrie* and *Campbell* put the goods into the defendants' hands. On what ground does the plaintiff claim to take those goods out of their possession? It must be, that he as owner has a right so to do; but I hold that he has no such right without giving a full indemnity. [184]

What is the indemnity offered? To pay the defendants the money actually advanced; but no offer was made to indemnify them against the outstanding bills. If that offer had been made, the defendants then would stand as brokers, without any advances, and could not hold the goods against the owner.

With respect to the indemnity, which the defendants have a right to claim, it has been said by the plaintiff's counsel, that Sir *William Pultney* offered his own acceptances, which would have become due at the same time with the bills. That would not be sufficient. I am of opinion, that if a man has given his acceptances on the faith of goods sent into his hands, and they are outstanding, he is not bound to take the promise or counter-acceptance of any man.

The plaintiff was nonsuited.

Shepherd and *Best,* Serjeants, and *Abbott,* for the Plaintiff. [185]

Dallas and *Williams,* Serjeants, for the Defendants.

PAGE *v.* FRY.

THIS was an action by the plaintiff, as agent to Messrs. *Hyde* and *Hobbs,* merchants of *Chichester,* to recover the amount of a loss on a policy of insurance, on a cargo of barley, shipped

Under the averment in the declaration on a policy of

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PAGE v. FRY.

insurance, "that the party is interested to the whole amount of the money insured," an interest in a part will entitle him to recover.

shipped on board the ship *Margaret*, from *Dundee* to *Chichester*. —Loss by capture.

The declaration was on the policy, with the common averment; *viz.* "That certain persons carrying on trade and commerce, under the style and firm of *Hyde* and *Hobbs*, were at the time of loading the said cargo, on board the said ship, and at the time of subscribing the said policy of insurance, and from thenceforth and until the time of the loss, *interested in the said corn to a large amount; to wit, to the amount of all the money insured thereon.*" The policy was for 400*l.*

The plaintiff proved, that he was the general agent in *London* for *Hyde* and *Hobbs*; and, by their direction, sent for the corn in question, to his correspondents in *Dundee;* by whom the corn was shipped and consigned to *Hyde* and *Hobbs*, in whose name the bills of lading were made out; but it appeared, that while the corn was on its passage, *Hyde* and *Hobbs*,
[186] thinking the adventure too large, had let a person of the name of *Hack* into a share of the cargo, who thereby became jointly interested with themselves.

Upon this coming out in evidence, the defendant's counsel contended, that the plaintiff ought to be nonsuited. That the interest of the plaintiff was a material averment in the declaration, and ought to be proved as laid, or it was a variance. That proof of interest in a part, could never support an averment that the party was interested to the whole amount of the sum insured, which was the case here.

The plaintiff's counsel replied, that it was sufficient for the plaintiff to shew an interest in the property insured, to entitle him to recover: That here the averment was, that he was interested to a large amount; *to wit*, "to the amount of all the money insured," under a *viz.*: That in actions upon bills or notes, the declaration was for the whole money mentioned in the body of the bill or note, and yet it was every day's practice for the party to recover but a part of it: That here the barley was ordered by *Hyde* and *Hobbs*, and paid for by them, and the sale took place to *Hack* while the corn was on its way; so that *Hyde* and *Hobbs* might be deemed as entitled to the whole cargo, subject to the claim of *Hack*, for his share: That in the case of *Page* v. *Rogers*, *Park*'s Ins. 402, where in an action on a policy of insurance on a ship, the averment was, that the plaintiff was entitled in interest to one-third of the ship insured; and it having come out in evidence that the plaintiff

plaintiff was once sole owner; and he not having proved his having parted with his interest in the other two-thirds,—it was objected, that the evidence did not correspond with this averment of interest in the declaration. Lord MANSFIELD over-ruled the objection. 1800. PAGE v. FRY.

Lord ELDON said, that he had considerable doubts on the subject; but he was of opinion, that the evidence entitled the plaintiff to recover: the order was given by *Hyde* and *Hobbs*, the cargo was conveyed to them, so that there was a time when the whole and absolute property was vested in them; during that time they had let *Hack* into a participation of the adventure. This did not seem to divest that insurable interest which they originally possessed.

His Lordship, therefore, directed the jury to find a verdict for the plaintiff, giving the defendant leave to move to set the verdict aside, and enter a nonsuit.

In the next term this motion was made. The Lord Chief Justice continued of the same opinion, and the rest of the Court concurred with him. Mr. Justice CHAMBRE, in his opinion held, that the plaintiff was not bound by the terms of the averment, to shew any thing more than that he had an interest in the subject insured; and that if he shewed an interest to the extent of a one-hundredth part of the cargo, that it would be sufficient. 2 Bos. and Pull. 240.

The rule was therefore discharged.

Lens, Serjeant, and *'Espinasse* for the Plaintiff.

Shepherd and *Best*, Serjeants, for the Defendant.

END OF EASTER TERM.

CASES

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN

TRINITY TERM, 40 GEO. III.

SECOND SITTINGS IN TERM.

24 *June*, 1800.

Aldridge, Pauper, *v.* Ewen.

In assumpsit for necessaries furnished to the defendant's apprentice, the plaintiff must prove him to be legally an apprentice; and if the indenture of apprenticeship has not been legally stamped, the plaintiff cannot recover on those counts so laid.

ASSUMPSIT for meat, drink, &c. furnished to defendant's apprentice.

The action was brought to recover a sum of money for the board and lodging of a son of the plaintiff, whom he alleged he had bound apprentice to the defendant.

The plaintiff had notice to produce the indenture of apprenticeship. A witness proved, that he had been employed to prepare it, and that it was suggested, it would save expences to have it executed at *Perth* in *Scotland:* that it was prepared and brought from *Perth,* and was, in fact, executed at *Wapping* by the plaintiff; but that there was no stamp to it.

Garrow, for the defendant, objected: that the plaintiff must be nonsuited, as he had not proved any legal apprenticeship of the person for whose board and lodging the plaintiff sought to recover.

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Erskine said, that he could prove the defendant having taken the young man *as* an apprentice, and of his having served the defendant in that capacity; and that that should satisfy the averment in the declaration.

Lord Kenyon. The plaintiff declares on a contract for necessaries

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ALDRIDGE, Pauper, v. EWEN.

necessaries furnished to the defendant's apprentice; and this is so stated in the declaration. To entitle the plaintiff to recover, therefore, it must appear that the relation of master and apprentice legally subsisted between the parties, as it is in that character only the defendant is charged. This has not been made out by the plaintiff. An apprentice can only be bound by indenture; that indenture must be legally stamped. The articles of apprenticeship, in this case, appear to have been prepared at *Perth*, and executed at *Wapping*, and to have no legal stamp. They are therefore void; and the plaintiff has failed in proving this necessary averment, and cannot recover.

The plaintiff proved the payment of 16*s*. at the request of the defendant; and had a verdict for that sum.

Erskine and *Hovill* for the Plaintiff.

Garrow for the Defendant.

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BARBER *v.* HOLMES.

Same day.

Where defendant relies on coverture as a defence to an action, it is not sufficient evidence that her husband was living at a particular time to produce the muster of a ship from the Admiralty, in which a person of his name is found, without other evidence of his identity.

THIS was an action of assumpsit, for goods sold and delivered.

The defence set up was,—That the defendant, at the time of the goods being furnished to her, was a married woman.

The fact of the defendants' having been covert, was not denied by the plaintiff; but that upon which he relied was, that her husband was dead when she obtained the goods. He proved the delivery of the goods in *November*, 1795; previous to which time it was given in evidence, that she had been heard to declare that her husband was dead: that she had communicated to his father and brother that he was so, and had gone into mourning for him. But it was proved, that she had represented her husband to have been an officer on board a King's ship, and that he had died in the West Indies.

To prove that he was living subsequent to the delivery of the goods, a witness was called, who said she had received two letters from him, dated in *July*, 1796, from *Plymouth Sound*, from on board the *Santa Margaretta* frigate. But the letters were not produced; and the witness said they were lost.

Per Lord KENYON. This is not sufficient: it is not the best evidence. If he had been in *Plymouth* so recently, some witness might be called who saw him there.

Garrow then called a clerk from the Admiralty, who produced [191]

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BARBER v. HOLMES.

duced the muster of the ship *Santa Margaretta*, in order to ascertain the time when the defendant's husband was living; in which muster was the name of *John Holmes*, as a serjeant of marines, on board that ship.

Lord KENYON expressed some doubt, whether he could admit such book as legal evidence?

Garrow said, it was the constant practice at the *Old Bailey* to admit such muster-roll as evidence, in all cases of indictments, for forgeries of seamen's wills and powers.

Lord KENYON. It is brought as evidence of the identity of the person; it is not so *per se;* connected with other circumstances, it might perhaps be sufficient; but on the whole of the evidence offered for the defendant, she has not proved that which would be an answer to the plaintiff's demand, if it were true. She has herself represented that her husband was dead when she obtained the credit. No person is called who has seen the husband. The letters, if produced, might have been important; but none appear. The only evidence then is, that book from the Admiralty; which proves nothing as to the fact of, Whether *John Holmes*, whose name is there found, was the husband of the defendant, or not?

Verdict for the plaintiff.

Erskine and *Marryat* for the Plaintiff.

Garrow for the Defendant.

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SITTINGS AFTER TERM AT WESTMINSTER.

TUSON v. BATTING.

July 3d.

If a surgeon furnishes a bill to his patient and he leaves a blank for his charge for attendances: if the patient pays a certain sum on that account, as the surgeon made no specific charge, he is bound by the sum so paid, and can recover no more.

ASSUMPSIT by the plaintiff, who was a surgeon, for attending the defendant's wife.

The matter in dispute was the quantum of payment which was claimed by the plaintiff. The defendant lived out of town, and the attendances had been made there; the plaintiff claimed, as a customary charge, one guinea *per* mile for each attendance, in addition to his fee. By this mode of calculation, the plaintiff's demand, would have amounted to 200*l.*; but he had delivered a bill, without a specific charge, leaving a blank for the sum he was to receive.

The defendant paid 70*l.* into court: this was taken out, and the plaintiff went for a further sum.

Several surgeons were called by the plaintiff, who all proved, that it was customary and usual for surgeons to make the charge

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Tuson v. Batting.

charge of one guinea *per* mile, where the attendance took place out of town.

Lord Kenyon, after observing that though professional men were entitled to a fair and liberal compensation for their assistance, said, There are, however, certain claims which they affect to set up, which, if unreasonable or improper, it is the business of the jury to controul, and this appears to be one of them. It has been said, that surgeons and physicians were on [193] the same footing; if it is so, it is of modern introduction. Dr. *Mead* and Dr. *Conyers Middleton*, early in the century, were of a different opinion, hardly ranking surgeons as a liberal profession; and considering physicians in a very different point of view. Surgeons' bills have been the frequent subjects of actions. I remember, an action brought by a Mr. *Sharp*, for attending a patient at *Hampstead*. Mr. *John Hunter* was examined, and said, when told the patient's complaint, "I cannot conceive why the plaintiff went there so often!" So that the necessity of those frequent attendances may become matter of inquiry. But a physician can maintain no action for his fees; they are *quiddam honorarium;* for which no action is maintainable. In the present case, the plaintiff delivered a bill, leaving a blank for his attendances. I am of opinion, that it is considering his demand in the light of a *quiddam honorarium*, and leaving it to the generosity of the person he attends; and that person having paid money into court to a certain amount, it is to be taken as the sum which he considers as a fair remuneration for the plaintiff's services, and which the plaintiff had left open in his bill; and that he cannot recover any more.

Chorley and Bolcot, 4 Term Rep. 317.

It appearing however afterwards, that the defendant had made an offer to pay at a certain rate, and thereby waived the blank bill, Lord Kenyon, left it to the jury to say, Whether the 70*l.* paid into court, was not sufficient to satisfy the whole of the plaintiff's demand?

The jury found for the Defendant. [194]

Erskine and *Wigley* for the Plaintiff.

Garrow for the Defendant.

1800.

BEAL v. THATCHER.

In case for giving a false character, it is evidence against the defendant, that he recommended the person trusted, to another person who was called as a witness.

BEAL *v.* THATCHER.

CASE, for giving a false character of one *Johnston* as to solvency; by reason of which the plaintiff had given him credit for goods, which had not been paid for; *Johnston* being insolvent, and unable to pay.

The plaintiff's counsel called a witness, to prove that the defendant had recommended *Johnston* to *him*, and represented him as a man entitled to credit and in good circumstances: that he, in consequence, trusted *Johnston* with goods, and had been defrauded of them, *Johnston* being a man of no property. *Erskine* objected to this evidence. It was *res inter alios acta.* The issue was not, Whether he had defrauded the witness, —but the plaintiff?

Lord KENYON said, it was admissible: that it proved a subsisting fraudulent connection between the defendant and *Johnston*, and might therefore go to the jury.

Garrow and ——— for the Plaintiff.

Erskine for the Defendant.

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July 9th.

Where defendant pleads bankruptcy, and the plaintiff relies on the defendant having been a bankrupt before, it is sufficient proof of the first bankruptcy, to produce the proceedings, and to shew that the defendant submitted to that commission.

GREGORY *v.* MERTON.

THIS was an action of assumpsit, brought to recover the amount of the defendant's note, dated the 6th of *November*, 1796.

The defendant pleaded bankruptcy.

The facts were, that the defendant had become bankrupt prior to the notes having been given; and had obtained his certificate under that commission: but subsequent to the note, he had again become bankrupt; under which he had also obtained his certificate: upon which latter certificate he meant to rely.

The council for the plaintiff insisted, that the certificate obtained by the defendant under the second commission, was no bar to the action, he not having paid 15*s.* in the pound; and cited *Philpot* v. *Corden*, 5 Term. Rep. 287.

The defendant produced the certificate under the second commission.

To prove the first bankruptcy, the plaintiff produced the proceedings under that commission, as sufficient evidence that it had issued.

Gibbs, for the defendant, contended, that as the plaintiff was to get rid of the effect of the certificate produced, by shewing that

the defendant had been before a bankrupt, he should do it by going through the regular steps in establishing a bankruptcy, by proving the party a trader, the petitioning creditor's debt, &c. &c. in the usual way.

Lord Kenyon asked, If the defendant had submitted to the first commission?

He was answered in the affirmative. His Lordship then said, that this being an action against the party himself, his having submitted to the first commission, was sufficient evidence of the fact of the first commission without going into the evidence required by the defendant's counsel. [196]

The plaintiff's counsel then produced the proceedings under the first commission; in which was the surrender and last examination of the bankrupt (the defendant) making part of these proceedings before the commissioners.

Lord Kenyon held, that that was sufficient evidence of the former commission; and that the certificate under the second commission was no answer to the present action, unless the defendant could shew that, under it, he had paid 15s. in the pound.

Verdict for the plaintiff.

Erskine and *Marryat* for the Plaintiff.

Gibbs for the Defendant.

Egg *v.* Barnett, Gent.

Same day

To prove payment of a debt due by the defendant to the plaintiff, a banker's cheque, drawn by the defendant on his bankers, and which appeared to have been received by the plaintiff, is evidence to go to the jury of the payment.

ASSUMPSIT for work and labour, and goods sold and delivered.

Plea of *Non-assumpsit.*

The plaintiff was a gunsmith; and proved the work done, and goods delivered, to the amount of his bill.

*The defendant's case was, That the debt had been paid.

To prove this, the defendant produced two drafts, drawn by him on his bankers, in favour of the plaintiff, and which had been paid: on one of them the name of *Egg* (the plaintiff) was indorsed; and on the other, the name of *Wilks*, whom the defendant proved to be a person employed by the plaintiff to receive money for him.

Erskine, for the plaintiff, objected to this evidence, as inconclusive; inasmuch as any person's name might be used in a cheque on a banker; and that if it had been given as payment, the fact of the so giving it ought to be proved. [*197]

Lord

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Egg v. Barnett, Gent.

Lord Kenyon. Bills of exchange are made payable by the statute. This is not merely using the name in the body of the draft, which is arbitrary, and would of itself be certainly no evidence; but here the money has been actually received by *Egg* (the plaintiff) and his servant, for their names are put on the back of the checques, as receiving the money. This is evidence to go to the jury. If there were any other transactions between the plaintiff and the defendant to which the drafts could be applied, it would be open for the plaintiff to shew it. I think it evidence of payment, as the giving of the draft may be coupled with the transaction of there being dealings between the parties, though it would not of itself be evidence of a debt.

[198] The cause was afterwards referred to arbitration.

Erskine and *Marryat* for the Plaintiff.

Garrow and *Burrough* for the Defendant.

July 10.

Goss v. Jackson, Esq. and Bushell.

Where an act of parliament gives the form of conviction for any offence prohibited by the act, that form must be followed: and a warrant granted on a conviction drawn up in any other form is illegal, and the justices and those acting under it are trespassers.

THIS was an action of trespass for taking the plaintiff's goods, brought against the defendant *Jackson*, who was a justice of peace, and *Bushell*, the constable. The goods had been taken under a warrant issued by *Jackson*, directed to the constable, to levy the penalty on a conviction made by him against the plaintiff, under the stat. 33 *Geo*. III. ch. 84, for not having his name painted on his cart.

The plaintiff's counsel stated, that the conviction had been made without any summons having been issued.

Lord Kenyon interrupted him, and said, that as a conviction had in fact taken place, he could not in this action inquire into the regularity or irregularity of it; it was sufficient that there was a conviction.

Erskine, for the plaintiff, then stated, that the warrant and conviction were both defective in form, and contrary to law. That the statute had specifically pointed out the form, as well as mode of proceeding in both: and in neither had the form been attended to. That the statute required the warrant of
[199] distress to set out the name of the witness, the informer, and the distribution of the penalty: this had not been done. It also required that the order should be served on the party convicted, and demand be made of the penalty before any distress

distress could be made; which in this case had not been done, the order having been served on the plaintiff's son by mistake.

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Goss v. JACKSON, Esq. and BUSHELL.

With respect to the conviction itself, the form was given at the end of the act of parliament; which he contended was the only legal form of conviction which could take place, and which Mr. *Jackson*, the defendant, had not thought fit to follow.

Garrow, for the defendant, contended, that it was optional in the justice, in drawing up the conviction, to follow the prescribed form or not, as given in the act of parliament. That it was sufficient to make such a conviction, to which no legal objection could be made,—the statute being merely directory.

Lord KENYON said, he was of opinion that the statute was imperative, and that the form of the conviction there given was not to be departed from. That a question somewhat similar to the present had been argued before the Court of King's Bench, respecting a justice's order for turning an old footpath, pursuant to the powers given by the Highway Act; and the opinion of the court was, that the justices in their order for turning the way, must follow the form prescribed by the statute (13 *Geo.* III. ch. 78); as the defendant had not therefore in this case drawn up the conviction in the legal form, the plaintiff was entitled to recover.* [200]

Verdict for the plaintiff for the amount of the goods.

Erskine and *Marryatt* for the Plaintiff.

Garrow for the Defendants.

* The case alluded to by the Lord Chief Justice was *Davison* v. *Gill*, which was argued in Trinity Term, but stood over till Michaelmas Term for a compromise; now reported in Michaelmas Term, 40 *Geo.* III. *East* Rep. 64.

The *King* v. *Milton*. Trinity Term, 25 *Geo.* III.

This was a motion of arrest of judgment on an indictment against the defendant for not obeying an order of sessions.

The defendant had been convicted at the sessions, for not entering a servant, and had been fined: for not paying the fine, he was indicted and convicted; and the present motion was to arrest the judgment on that indictment.

Several objections were made: 1st, That the indictment was by way of recital only, and without any fact being averred: 2dly, That there was nothing in the dates or times, to show that the offence was committed within the time necessary to constitute one: 3dly, That it did not appear that *Anthony Prior*, the servant, was a person within the meaning of the statute, liable to the duty on servants.

Cowper, for the prosecution, contended that there being in this case a conviction,

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Goss v. Jackson, Esq. and Bushell.

viction, by justices having competent jurisdiction, that the conviction only was necessary to be proved, as it stood then in full force and effect.

Caldecott and *Bower*, for the defendant, insisted on the several objections: as to the 1st, That it was a clear principle of law, that nothing was to be intended in a criminal prosecution; and that, therefore, nothing defectively set out could be supplied, as could be done in a civil action; but that in this case there was no positive charge, nor a distinct averment of the sentence of the justices: 2dly, That in every indictment the exact time of committing the offence ought to appear; but here it did not appear that the sessions had any authority, because the thing charged does not purport to be an offence: 3dly, That for want of stating the servant to be liable to the duty imposed by the act, there would be sufficient ground for arresting the judgment, even in a civil case. *Com.* 576. 2 *Sho.* 1126.

[201] Lord Mansfield. The foundation of the indictment is the order of sessions. Nothing appears to show that they had no jurisdiction; and till the order is reversed it ought to be obeyed. We cannot hear objections to the conviction which do not appear on the face of it, in a motion of arrest of judgment, for disobeying the order made on it.

Buller, Justice, The order of sessions is stated without any recital at all. Where a court, having competent jurisdiction, have pronounced an order, as long as it remains in force it ought to be obeyed.

Rule for arresting the judgment discharged.

July 11.

Carrol v. Bird.

An action will not lie at the suit of the servant against his master for not giving him a character.

THIS was an action on the case.

The declaration stated,—That the plaintiff's wife having been retained by the defendant as a servant was dismissed from the said service: That after she was so dismissed, she had applied to a person of the name of *Stewart*, for the purpose of being retained and hired as a servant: That Mrs. *Stewart* was ready and willing to have hired and taken her into her service, if the defendant would have given her a character, and such character was satisfactory: that it was the duty of the defendant by law, to have given her such character as she deserved, and then assigned a breach: that the defendant, not regarding such her duty, wholly refused to give her any character whatever; by reason of which the said Mrs. *Stewart* refused to hire her into her said service.

Plea of Not Guilty.

Upon the pleadings being opened, Lord Kenyon asked the [202] plaintiff's counsel, If they had any precedent for this action, or had ever known of such an action being maintained?

Gibbs

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CARROL v. BIRD.

Gibbs said, he had no case.

Upon which his Lordship added,—There was no case; nor could the action be supported by law. By some old statutes, regulations were established respecting the characters of labourers; but that in the case of domestic and menial servants, there was no law to compel the master to give the servant a character; it might be a duty which his feelings might prompt him to perform, but there was no law to enforce the doing of it.

Gibbs and *Woodfall* for the Plaintiff.

Garrow for the Defendant.

SEDLEY v. SUTHERLAND and others.

In a joint action of trespass, the plaintiff should go for one trespass done at the same time, in which all were implicated; and if he goes for a trespass done at a time when all were not present he shall not afterwards be allowed to go for a time when they were.

THIS was an action of assault and false imprisonment. The action was brought by the plaintiff to recover damages against the several defendants following; namely, The assignees of the estate of *Nowlan*, a bankrupt; Messrs. *Crowder* and *Lavie*, who were the Solicitors under that commission; and the magistrates by whom the plaintiff was committed to prison.

The ground of the present action was, the arrest and detention before stated in the cause of *Sedley* v. *Arbouin*, ante page 174. The plaintiff had been arrested in *Dublin*, the 16th of *April*, and continued in prison until the 10th of *June* following.

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*Upon the case being opened, Lord KENYON said, that he thought this action could not be maintained against the attorneys, unless it could be proved that they had gone beyond the line of their duty, by which the plaintiff had suffered. That it would be a case of infinite hardship if an attorney, who was instructed to use the most effectual means to secure parties suspected, should be subject to actions of trespass, in the fair discharge of his duty.

Law said, that it had been decided, that an action of trespass for false imprisonment was maintainable against an attorney and his client, in the case of *Barker* v. *Braham* and *Norwood*, 3 *Wils.* 368; but that here he could prove acts of the attorneys, unconnected with their duty as attorneys;—such as a letter written to *Dublin*, ordering the arrest.

Lord KENYON said, he thought that circumstance only not sufficient.

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SEDLEY v. SUTHERLAND and others.

The plaintiff then proceeded in his case; and after examining into the circumstances of the arrest, which took place in *Ireland*, and from whence the plaintiff was conveyed to *England*,—was then proceeding to examine into what passed before the magistrates.

Garrow, for the defendant, objected to this evidence: that the plaintiff having elected to proceed for a trespass antecedent to any interference of the magistrates, he should not now be at liberty to go into it.

[204] Lord KENYON. Certainly not. Where an action is brought for a joint trespass, and the plaintiff elects to go for a trespass committed at any particular time, he must confine himself to that period; and if all the defendants were not then concerned in the trespass committed at that time, the plaintiff cannot have recourse to a trespass committed at a future time, when some of the defendants were concerned, who were not implicated in the first transaction; and the reason is this, that some of the defendants might be thereby subjected to damages for a trespass, wherein they had no part or concern.

The plaintiff was nonsuited.

Law, *Gibbs*, and *Hovill* for the Plaintiff.

Erskine, *Garrow*, and *Knowlys* for the Defendants.

SITTINGS AFTER TERM AT GUILDHALL.

July 15.

JONES v. BRINDLEY.

If the declaration on a special agreement states as the foundation of the plaintiff's action, that the defendant was by his means enabled to receive a sum of money, and the evidence is, that he was enabled to receive stock, it is a variance.

THIS was an action of assumpsit on a special agreement. The declaration stated, that in consideration that he, the plaintiff, having it in his power to give the defendant information, whereby one *Francis Needham* could recover a considerable sum of money, to which he was entitled, and which belonged to one *Sarah Needham*, deceased, would give such information as would enable the said *Francis Needham* to receive the same,—the defendant undertook and promised to pay him at and after the rate of ten *per cent.* for all the monies which he should be so enabled to receive. The declaration then averred, that he did give such information, whereby the said *Francis Needham* did receive 500*l.* under the will of the

the said *Sarah Needham;* by reason whereof he became liable to pay him the sum of 50*l.*, being at and after the rate of ten *per cent.*

The plaintiff proved the agreement to pay as stated in the declaration. He then gave in evidence, that he had discovered 500*l.* stock, standing in the name of *Sarah Needham,* to whom *Francis Needham* was residuary legatee, upon which no interest had been received for ten years; and of which stock [206] *Francis Needham* had procured a transfer into his own name; and there closed his case.

Gibbs, for the defendant, insisted that he was entitled to nonsuit the plaintiff. That the plaintiff had declared he had given such information of a large sum of money, which *Francis Needham* was thereby enabled to receive; whereas the evidence was not of any money, but of stock; the transfer of which *Francis Needham* had been enabled to receive.

For the defendant, it was contended, that though the stock was discovered, in fact it was of the value of 500*l.* and so satisfied the averment in the declaration.

Lord KENYON, after reprobating in very pointed terms the conduct of the plaintiff, for making use of that information which his situation might have given him to found a demand on its communication; and though doubting whether that objection might not go to the action itself, said that he was of opinion, the objection of the defendant's counsel was good in point of law; and that the evidence varied from the declaration: that stock was not money; and it had so been decided.

The plaintiff was nonsuited.

Garrow and *Comyn* for the Plaintiff.

Gibbs and *Bevan* for the Defendant.

Vide *Nightingale* v. *Metivier,* 3 *Burr.* 2589.

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BURTON *v.* LOYD.

July 21.

In an action for giving a false character, whereby the plaintiff has lost the value of his goods, the person recommended having become a

THIS was an action on the case, to recover damages against the defendant, for giving a false character of one *Lewis Goldsmith,* who carried on the business of a tailor and man's mercer, under the firm of *Lewis Goldsmith and Co.*

Plea of Not Guilty.

The plaintiff called a witness, who proved, that on the 22d of *October,* 1799, one *Rhodes* came to his shop to purchase some goods for *Lewis Goldsmith* and Co. That a reference

being

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being required by the plaintiff, to inform himself of the credit of *Lewis Goldsmith* and Co. a reference was given to the defendant. That the witness went to the defendant, and mentioned that they had been referred to him, and asked him if they might trust *Lewis Goldsmith* and Co. for six months? When *Loyd*, the defendant, answered, and said, "We are in "the habit of doing business with them to a considerable "amount, and consider them as perfectly safe." That in consequence of such reference, the plaintiff delivered goods to *Lewis Goldsmith;* which had not been paid for, *Goldsmith* having become a bankrupt.

bankrupt, a creditor of the bankrupt is a good witness to prove the plaintiff's case.

Rhodes was called as a witness. He was asked on his *voir dire,* If he was not a creditor under *Goldsmith*'s commission?

He answered in the affirmative.

Garrow then objected to his competency. He stated his [208] objection to be, that the plaintiff, not having been paid for his goods by *Goldsmith,* sought to recover the value of them by this action; that if he succeeded, and did recover the value of them by this verdict, it would discharge the demand, and of course all claim against *Goldsmith*'s estate; by which means the witness's dividend would be increased.

Lord KENYON. How would the debt be discharged as against *Goldsmith?* It would not be so. This action is founded *in maleficio,* not on any contract: the damages to be recovered in this action are not as payment to the plaintiff for his goods furnished to the insolvent person, but as a punishment on the defendant, for his want of good faith and integrity; and the recovery of those damages would not conclude the demand for the price against *Goldsmith*'s estate, which will still remain liable.

The witness was admitted.

Lord KENYON, in summing up the evidence to the jury, said, that the action was founded on all the moral rules which ought to govern society: that when a character was asked of any man in trade, to whom the party enquiring was about to credit, that all the circumstances within the person's knowledge ought to be stated, and the party left to judge for himself, whether he would give credit or not.

Verdict for the plaintiff.

Erskine, Law, and *Yates,* for the Plaintiff.

Garrow, Gibbs, and *Wood,* for the Defendant.

BARNETT

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BARNETT v. STONE.

BARNETT *v.* STONE.

If a defendant undertakes to pay the plaintiff the difference between taxed costs and costs out of pocket, in consideration of plaintiff giving him time for payment of a debt recovered and the costs, it is not usury.

THIS was an action of assumpsit brought to recover the amount of a bill of exchange, drawn in favour of the plaintiff by one *Thompson* on the defendant, and accepted by him.

The defendant defended the action on the ground of usury, under the following circumstances:—

In Hilary Term, 1799, the present plaintiff had brought an action against the defendant, which had been referred to arbitration: the arbitrators had made an award for 500*l.* in favour of the plaintiff; but had by mistake awarded to him the costs of the award, intending to have given him the costs of the reference: this on taxation made a difference of 30*l.* against the plaintiff, being the difference between the taxed costs and the costs out of pocket.

The money not being paid according to the award, the plaintiff was preparing to proceed against the defendant; when the latter came forward and proposed to the plaintiff, that if the plaintiff would take his bills at a distant day for the sum awarded and the taxed costs, that he would pay the costs out of pocket, and include them in the amount of the bills to be drawn. The plaintiff consented, and on one of the bills so drawn the present action was brought; the defendant contending, that the 30*l.* being given for forbearing the pay- [210] ment and exceeding the rate of 5*l. per cent.* for the time, was usury, and made the bill void in which that sum was included.

Lord KENYON, on the case being stated, was of opinion that it was not usury; and, there being no other defence, the plaintiff had a verdict.

Law, Const, and *'Espinasse* for the Plaintiff.

Erskine, Garrow, and *Marryatt,* for the Defendant.

PARR *v.* ELIASON *et alt.*

Where the assignees of a bankrupt become *bona fide* possessed of a bill of exchange by the

THIS was an action of trover for a bill of exchange, against the defendants, as the assignees of *Persaint* and *Bodecker,* who were bankrupts.

On the 18th of *June,* 1799, the plaintiff, who was the holder of the bill, applied to the house of *Persaint* and *Bodecker,* to discount

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PARR v. ELIASON et alt.

payment by it of a debt due to the bankrupt-estate, which bill had in the course of its negotiation been in the possession of the bankrupts, and on the discounting of which they took usurious interest, that shall not impeach the assignees' title to it.

discount it for him; which they consented to do, on the terms of the plaintiff taking part in cash, and part in their acceptance at three months of a bill to be drawn on them by the plaintiff. The plaintiff agreed to those terms, and indorsed the bill to them, they taking the whole discount, without any allowance for the interest of their own bill at three months, which they gave to the plaintiff.

Persaint and *Bodecker* indorsed this bill away in the course of their trade, and it came into the hands of a debtor to their estate, who paid it in discharge of that debt to the defendants as the assignees, in discharge of that debt. The bill at three months, which had been drawn by the plaintiff, *on *Persaint* and *Bodecker*, was not paid by them when due: and the plaintiff was under the necessity of taking it up himself.

It was stated by the plaintiff's counsel, as the ground of his right to recover, that the bankrupts had become possessed of this bill usuriously, by taking the full discount without any allowance for the interest on their own acceptance, which had [*211] three months to run; and which too was given as a part consideration for the original bill, and never paid. That the stat. 12 *Ann*, having declared all assurances for payment of money lent on usury to be void, *Persaint* and *Bodecker* could claim no property in the bill, nor of course could their assignees who stood possessed of their rights only, and subject to all legal claims which could be made against them.

Lord KENYON. The bill has not come to the hands of the assignees immediately from the bankrupts, it was indorsed by *Persaint* and *Bodecker* for a valuable consideration; the holder became legally possessed of it, and has indorsed it to the defendants in the payment of a debt. The statute has declared all securities void which have their foundation in usury when they are first created; but usury in any intermediate stage of negotiation shall not make a bill void in the hands of a *bona fide* holder, who has given it for a *bona fide* consideration untainted with usury. I remember an old case, I think it is in *Siderfin:* that a conveyance which might be deemed as against [212] a purchaser fraudulent and voidable, yet might by matter *ex post facto*, be protected and made valid by the title of a subsequent *bona fide* purchaser. In this case the assignees derive their title to the bill from a *bona fide* holder; and they have a right to call his title in aid of their own, and for its protection. In the creation of this bill I see no usury. The constructions

structions on the statute of *Ann*, have declared all securities founded on usury void in the hands even of *bona fide* indorsers: that is not the case here: the defendant's immediate title to the bill is affected with no usury; and I am of opinion the plaintiff must be called.

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PARR *v.* ELIASON *et alt.*

Nonsuit.

Law and *Wood* for the Plaintiff.

Erskine, Gibbs, and *Taddy,* for the Defendants.

In the next term the plaintiff moved to set aside the nonsuit; but the court concurred in opinion with Lord KENYON.

East. Rep. 92. S. C.

Vide *Cuthbert* v. *Hayley*, 8 T. Rep. 390. *Pergers* v. *Laughan*, 1 Sid. 133. *Lowther* v. *Carleton*. Case in Eq. temp. Lord *Talbot*, 187. *Ferral* v. *Sheen*, 1 *Saund.* 294.

IN THE COMMON PLEAS. SITTINGS AFTER TERM AT GUILDHALL.

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BREWER *v.* PALMER.

Where premises have been demised by an agreement in writing, but not on stamped paper, the plaintiff is bound to give the writing in evidence; and if not stamped at the trial, the plaintiff shall be nonsuited, and shall not be allowed to go use and occupation generally.

ASSUMPSIT for use and occupation.

The plaintiff, by a witness, proved the occupation by the defendant of the premises; but on his cross-examination it came out, that there had been an agreement in writing; but it was stated that it was not stamped.

The plaintiff's counsel contended, that the agreement not being stamped, was to be deemed as no agreement, and not binding on the parties; and that he might therefore relinquish it, and be at liberty to go into evidence, generally, for the use and occupation.

Bailey, Serjeant, for the defendant, contended, that as it appeared the defendant enjoyed the premises under a written contract, the plaintiff was bound to give it in evidence.

Lord ELDON ruled, that the plaintiff was bound to give it in evidence: That the terms under which the defendant held, being a specific contract between the plaintiff and him, the plaintiff was bound to shew what that contract was; it might contain some clauses which might prevent the plaintiff from recovering, and others for the benefit of the defendant; which he had a right to have produced; but that not being

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stamped

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stamped, no evidence could be given of it, and the plaintiff should be nonsuited.

Shepherd, Serjeant, and *Const* for the Plaintiff.

Bailey, Serjeant, for the Defendant.

Same day, *July* 11.

When the master of a family is in the habit of paying ready money for articles furnished in certain quantities to his family, if the tradesman suffers other goods of the same sort to be delivered without informing the master or satisfying himself that they were for his use, when in fact they were not, the master shall not be liable.

Pearce v. Rogers.

ASSUMPSIT for goods sold and delivered.

The action was brought by the plaintiff, who was a publican, to recover from the defendant the amount of a score for beer, furnished to the defendant's family.

The circumstances of the case were,—That the defendant, who resided in the same village with the plaintiff, dealt with him for the porter used in his family; that the defendant was in the habit of paying ready money to the plaintiff for a certain quantity of porter, which was allowed for the family; and in fact, though the beer for which the action was brought had been delivered at the defendant's house, it had been carried in clandestinely by the maid-servant, for her own use and that of the defendant's wife's mother; but it did not appear that the plaintiff knew of this circumstance.

Lord Eldon said, that to allow such a demand, would be to put it in the power of servants and tradesmen to ruin the master. That where the master was in the habit of paying ready money for part of the goods furnished, it was sufficient [215] notice to the tradesmen, that he considered those only as furnished to his family; to put the tradesman on his guard, and to make it incumbent on him to satisfy himself that the goods were really for the use of the master's family: that where the tradesman suffered his goods to be so delivered, and without informing the master, if in point of fact they did not come to his use, he should hold him not to be liable: that in this case the porter not having been delivered to the defendant's use, there was, in his opinion, no pretext to charge him.

The plaintiff was nonsuited.

Cockell, Serjeant, and *Reader* for the Plaintiff.

Shepherd, Serjeant, and *Jervis* for the Defendant.

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SINGLETON *et alt.* *v.* BUTLER.

SINGLETON *et alt.* *v.* BUTLER.

Where a trader having accepted a bill for the use of a third person, is induced by that person to pay the bill, after having informed him that he was insolvent, on the promise of such person to guarantee the payment of a composition to the trader's creditors, and he afterwards becomes bankrupt, that payment is a fraudulent preference.

ASSUMPSIT for money paid to the defendant's use,—money had and received, with the usual money-counts.

The action was brought by the plaintiffs who were the assignees of one *Howell*, a bankrupt, to recover the amount of sums paid by the bankrupt, under the following circumstances: *Butler*, the defendant, in *February*, 1799, applied to the bankrupt *Howell*, to accept a bill for him; to which *Howell* consented; and accordingly a bill was drawn by *Butler*, in his own favour, on *Howell*, three months after date. The bill was drawn and *dated the 1st of *March*, and of course fell due the 4th of *June* following. [*216]

Two days previous to the bill becoming due, *Howell*, the bankrupt, came to the defendant *Butler*, and stated to him, That from several severe losses which he had had, he would be unabled to take up the bill: that his affairs were in a bad state, and that he could not pay more than 10*s*. in the pound. *Butler* the defendant, said to *Howell*, The bill must be taken up by him; and that if he would do it, he (*Butler*) would be security to his creditors for the composition he would propose to give them. *Howell* was by this induced to pay the bill; and on the 5th of *June* he became bankrupt.

This action was therefore brought to recover back this money as paid by *Howell* in fraudulent preference to his other creditors, and at the time when he was insolvent, and that fact known to the defendant.

For the defendant it was insisted, that a debtor might, though insolvent, pay a creditor, if it was in consequence of the creditor's application; which point had been settled in the case of *Smith* assignee of *Hamilton* v. *Payne*, 6 Term Rep. 152; in which case a quantity of books had been delivered to the defendant, in discharge of his debt, and after he was informed of the bankrupt's then insolvency: yet that was held to be good. So here *Howell* was induced to pay the bill, from *Butler*'s insisting it should be paid; which he had a right to do, as *Howell* was the acceptor of the bill.

Lord ELDON said, he was of opinion that this was a fraudulent preference. In this case the payment was made in consequence of the bankrupt's calling on the defendant; not of the defendant's coming to him, and insisting on the payment; [217]

and

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SINGLETON *et alt.* v. BUTLER.

and the inducement held out was, the service to be rendered to him by *Butler*'s becoming security to his creditors. It therefore differed from *Smith* v. *Payne*, for there the money was actually due; besides this, there was a circumstance in evidence, of an alteration in the bill, which, though not brought home to the defendant, had an appearance of fraud.

Verdict for the Plaintiff.

In the next term a new trial was moved for; and the other judges concurred with Lord ELDON. Vide 2 *Bos.* and *Pull.* 283. S. C.

END OF TRINITY TERM.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

ON THE

HOME CIRCUIT.

SUMMER ASSIZES, 1800, AT HERTFORD, CORAM LORD KENYON.

CLARK, Esq. *v.* TAYLOR.

July 28th.

In an action of debt on the game-laws, the parish laid in the declaration is only for a venue; and the plaintiff may prove the defendant guilty at any other parish within the county.

THIS was an action of debt on the game-laws, to recover from the defendant the penalties for killing game, he not being qualified, and not having a licence.

The declaration stated the offence of killing the game, to have been committed in the parish of *Hippolitts,* in the county of *Hertford.*

The plaintiff having proved that the defendant had killed game on his manor, the counsel for the defendant were directing his cross-examination of the witnesses as to the place, suggesting that it was not in the parish of *Hippolitts,* as laid in the declaration, but in an adjoining parish.

They were interrupted by Lord KENYON, who said, it was of no importance. When part of the penalty was given to the poor of the parish, then there it was matter of substance, and the offence was necessarily laid in the proper parish; but as the penalty was not now so disposed of, the parish was only laid as a *venue;* and the plaintiff might prove the defendant guilty at any other other parish within the county. [219]

The plaintiff had a verdict for one penalty.

Garrow and *'Espinasse* for the Plaintiff.

Shepherd, Serjeant, for the Defendant.

MAIDSTONE,

1800.

MERCER v. WISE, et alt.

MAIDSTONE, CORAM LORD KENYON.

MERCER v. WISE, *et alt.*

Aug. 4th.

A trader who has been declared a bankrupt, does not preclude himself from trying the validity of the commission in an action against the assignees, by having surrendered under the commission, and by having presented a petition to the Chancellor to enlarge the time for his surrender.

THIS was an action of trover, brought by the plaintiff, who was a bankrupt, against the defendants, who were the assignees chosen under his commission, and the auctioneer by whom his effects were sold under it: the object of the action was to try the validity of the commission which had issued against him.

The plaintiff proved the taking of the goods mentioned in the declaration, which had been his *property before the bankruptcy; and there rested his case.

The plaintiff had been declared a bankrupt in *November*, 1799: he had applied to enlarge the time for his surrender, which had been granted; and he had actually surrendered and passed his last examination at the enlarged time. On these facts the defendant's counsel contended, that the plaintiff had, by his own acts, estopped himself from contesting the commission, by having surrendered under it, and [*220] thereby admitted that it had legally issued; besides which, they produced an office-copy of the petition itself, presented by the plaintiff to the Lord Chancellor, in which he stated, "That a commission of bankruptcy had been awarded and "issued against him, under which he had *been duly declared a* "*bankrupt;*" and praying that the time for his surrender might be enlarged.

Lord KENYON said, that he should not hold this to preclude the plaintiff from contesting the legality of the commission which had issued against him. That being declared a bankrupt, whether rightfully or not, he was bound to surrender to it under the terrors of committing a felony; which he would have incurred, had he not surrendered. That as therefore his apparent acquiescence under the commission was from necessity, he should not hold the surrender an acquiescence in the legality of the commission, but leave him at liberty to contest it. That as to the words of the petition, which were pressed by the defendant's counsel, as evidence [221] of his subscribing to the legality of the commission, they were the formal words of the petition, and merely of course.

The

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MERCER v. WISE, et alt.

Where a commission of bankruptcy is regularly proved, it shall not be in the power of the bankrupt himself to defeat it by shewing a prior act of bankruptcy committed by him, but upon which no comission issued.

The defendants then proved the trading, the act of bankruptcy, the petitioning creditors' debt, and the other usual steps under a bankruptcy, in support of the commission.

The plaintiff's counsel were then proceeding to invalidate that commission of bankruptcy, by shewing an act of bankruptcy prior to that upon which the existing commission was founded.

This was objected to by the defendants' counsel, who, contended, that this evidence was inadmissible: that it was not competent for the bankrupt himself to impeach the validity of the existing commission, by shewing that he was a bankrupt at an antecedent time: That if this was allowed, traders might defeat every commission of bankrupt issued against them, by having a pocket-act of bankruptcy to be produced at a future time in order to defeat a regular bankruptcy, as it suited their interest or not, to get rid of it.

Lord KENYON said, he was opinion that the plaintiff could not go into such evidence: it might be competent for a third person, who might be affected by the commission, to endeavour so to impeach it; but that the present commission having been regularly established, in all its requisites, it was not in the power of the bankrupt himself to attack it, by shewing a preceding act of bankruptcy committed by him which had not been acted upon.

At the instance, however, of the plaintiff's counsel, who pressed it, his Lordship permitted them to attempt the proof proposed; but they failed in it, and the defendants had a verdict. [222]

Shepherd, Serjeant, *Bailey*, Serjeant, and *'Espinasse* for the Plaintiff.

Best, Serjeant, and *Marryatt* for the Defendants.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

MICHAELMAS TERM, 41 GEO. III.

IN THE

KING'S BENCH.

SECOND SITTINGS IN TERM.

Monday, *Nov.* 17.

MEYMOT *v.* SOUTHGATE.

The penalty given by the statute 14 *Geo.* III. chap. 78, sect. 67, is recoverable against the master-builder, where the regulations of the statute, and not against the proprietor of the premises.

THIS was an action of debt, brought to recover a penalty of 10*l.* given by the statute 14 *Geo.* III. chap. 78, sect. 67; by that section, it is enacted, "That every master-workman, "or other person, who shall build, or cause to be built, any "house, or any addition to any house, &c. shall within four-"teen days after such house, &c. shall be covered in, cause the "same to be surveyed by the surveyor of the district, &c. &c. "under a penalty of 10*l.*"

The breach of the statute imputed to the defendant, and on which the plaintiff grounded his right to recover, was,—That the defendant being a proprietor of an house in the borough of *Southwark*, had not given the notice required by the statute; he having built and covered in an addition to it.

Garrow, for the defendant, on the evidence being given to the above effect, objected: that the action was not maintain-

[224] able. That the action had been misconceived; and arose from misreading the statute. That the plaintiff had read the act of parliament, "*Master*," with a stop after it, "*Workman*," *&c.*; whereas the words of the act are, "*Master-Workman*," not the man whose house was built, who knew nothing of the way in which the building was conducted, but the master-

workman

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MEYMOT v. SOUTHGATE.

workman who superintended the building of it; he was the person who, in reason and in law, ought to be liable to any penalty inflicted by the act. It would be a matter of infinite hardship if the proprietor of the house, who might never have seen it, who had given up the whole conduct of the building of it to another, should, by his acts, be subjected to a penalty.

It was answered by the plaintiff's counsel, that whatever might be the reading as to these words, whether to be taken together or not, the meaning of the act was to subject the proprietor; for the words of the statute were, "built, or "*caused to be built;*" which latter words certainly applied to the proprietor, though the word *built* might apply to the workman only.

Lord KENYON said, he was of opinion that the construction contended for by the defendant's counsel was the true one. It was impossible to suppose that it could be meant to subject a party to a penalty who had nothing to do with the act which had caused it; as the owner might live at a distance, and never interfere with the erection. That as to the words, *caused to be built*, which were urged as exclusively applying to the proprietor, they were equally applicable to the master-builder, who superintended and directed the work, and who ought to have taken care that the act of parliament had been complied with. That he was therefore of opinion the action was misconceived, and the plaintiff should be nonsuited. [225]

Nonsuit.

Mingay and *Marryatt* for the Plaintiff.

Garrow and *Harrison* for the Defendant.

REDPATH *v.* ROBERTS.

Same day.

In assumpsit for use and occupation of apartments which the defendant had quitted without giving notice, the plaintiff having put up a bill to let the apartments, will not prevent his recovering.

ASSUMPSIT for use and occupation of certain apartments in the plaintiff's house.

The action was brought to recover half a year's rent of the premises, from *Midsummer* to *Christmas;* the defendant having (as the plaintiff insisted) quitted at *Midsummer* without giving any notice.

The defendant's counsel attempted to prove, that after the defendant had quitted at *Midsummer*, the plaintiff had put up a bill at the window, and endeavoured to let the lodgings; but they were in fact not let. This, it was contended, was

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REDPATH v. ROBERTS.

exercising a right to dispose of the apartments for the time it was supposed they belonged to the defendant; and evidence that the contract was put an end to at *Midsummer*.

Lord KENYON said, that would afford no answer to the plaintiff's action. It was for the benefit of the defendant that the [226] apartments should be let; nor would he infer from the circumstance of the party's endeavouring to let them, that the contract was put an end to; that there must be other circumstances to shew it, and not an act of so equivocal a kind. That as the plaintiff had proved the taking of the premises, and the payment of the rent, it was incumbent on the defendant to prove that tenancy put an end to by express evidence.

The defendant then did prove an express notice to the plaintiff, that she would quit at *Midsummer*, and the acquiescence in it by the plaintiff; and had a verdict.

Mingay and *'Espinasse* for the Plaintiff.

Garrow and *Wingfield* for the Defendant.

SITTINGS AFTER TERM AT WESTMINSTER.

Nov. 29th.

POSTLETHWAITE v. GIBSON and SLADE.

When the stat. 24 Geo. II. chap. 44. orders that actions brought against constables shall be commenced within six months after the offence committed, it extends to cases only where the constable is acting under a warrant from a justice of peace.

THIS was an action of assault and false imprisonment. Plea of Not Guilty.

The plaintiff proved,—That on *Sunday*, the 20th of *January*, 1799, he was taken into custody by the defendants, one of whom was a constable, at *Tooting* in *Surry*, on suspicion of having committed a burglary. That he was kept in custody from that day till the *Wednesday* following, when, being brought before a justice of peace, he was discharged: and that he was taken into custody [*227] *without any warrant having been granted, directed to any constable or other person to apprehend him.

The action was commenced in the month of *February*, 1800.

It was objected by *Garrow* of counsel for the defendants: that the action had been commenced after the limitation prescribed by the statute, 24, *Geo.* II. chap. 44; by which it is ordered, That all actions against constables should be commenced within six months after the offence committed; and that the plaintiff should therefore be nonsuited.

It was answered by the plaintiff's counsel, that the statute did not apply to the present case; that it applied to the cases

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POSTLETHWAITE v. GIBSON and SLADE.

only where the constable was acting under the warrant of a justice of peace: whereas, in the present case, he was proved expressly to have been acting without any warrant whatever.

Garrow then contended, that if the defendant was acting as a constable, by virtue of a charge given to him, he was entitled to the protection of the statute.

Lord KENYON, after referring to the statute, said, I am afraid I must hold that the statute does not extend to protect the defendants. It is strange that the statute should give a protection to justices of the peace, who are persons of more knowledge and experience than constables, and not to persons of the latter description. But I am bound by the words of the statute, which applies to cases only where there has been a warrant granted by a justice of peace, and the constable is acting under it; not to cases where there has been a charge only.

The defendants were proceeding to give evidence in mitigation of damages, of the grounds of their suspicion under which the plaintiff had been taken into custody, when his counsel consented that he should be nonsuited. [228]

Gibbs and *Comyn* for the Plaintiff.

Garrow, *Knowlys*, and *Clifton*, for the Defendants.

JOLLY *et alt.* Assignees of NORTON, *v.* WALLIS.

Dec. 3.

Where a composition-deed or instrument is entered into by an insolvent, with a clause, that if certain creditors do not sign the deed, it shall be null and void; if such creditors accept of the composition, or the security for the composition, though they do not actually sign the instrument, it is valid and good.

THIS was an action of assumpsit, brought by the assignees of one *Norton*, a bankrupt, to recover the amount of several sums of money, alleged to be the property of the bankrupt which had come to the hands of the defendant.

The case as it appeared in evidence, was,—That on the 15th of *October*, 1798, *Norton*, having got into difficulties, called a meeting of his creditors: an agreement was then entered into, reciting, that a state of *Norton's* affairs having been arranged and laid before the creditors by Mr. *Wm. Wallis* (the defendant) and a proposal having been made by *Norton*, to pay a composition,—the creditors then present agreed to accept of 9*s.* in the pound for their respective debts, payable by three instalments; at four, ten, and fifteen months, with satisfactory security for the last payment; and *Norton* thereby agreed to pay into the hands of a banker, in the *names of *Harris*, *Rogers*, and the defendant, the sum of 100*l.* every month; and in de-

 fault [*229]

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JOLLY *et alt.* Assignees of NORTON, *v.* WALLIS.

fault of so doing, the creditors were to be at liberty to take all *Norton's* goods. And it was further agreed, That if all the creditors, whose debts amounted to 5*l.* did not sign the agreement on or before the 15th day of *November* following, the agreement was to be null and void: and that in the mean time, *William Wallis* (the defendant) or his representative, were to continue at the house of *Norton*, on behalf of the creditors; and should have liberty, from time to time, to examine the accounts, for the satisfaction of the creditors.

In consequence of this agreement, *Norton* gave his notes for the payment of the instalments, and procured a Mr. *Willis*, to join in a bond to *Rogers*, *Harris*, and the defendant, for securing the last instalment: this became due on the 15th of *February*, 1800.

Norton's notes, for the two first instalments, were regularly paid; and 400*l.* part of the last instalment, secured by the bond, was deposited in the banker's hands, in the names of the defendant, and of *Rogers* and *Harris*, the two other persons who were joined with him.

A commission of bankruptcy afterwards issued against *Norton*. The act of bankruptcy proved, on opening the commission, was by absconding about the second week in *February*, 1800.

Wallis, the defendant, was examined before the commissioners, under *Norton's* commission; the commissioners were of
[230] opinion, that the agreement was void; and the present action was brought to recover back the 400*l.* paid for the last instalment. This has been paid by *Norton*, by different payments of 100*l.* a month; *viz.* on the 12th of *October*, 12th of *November*, and 12th of *December*, of the year 1799; and on the 14th of *January*, 1800.

An agreement to accept a composition, where there is no assignment of the trader's effects, is not an act of bankruptcy.

Lord KENYON asked the counsel for the plaintiff, If they meant to rely upon this agreement as an act of bankruptcy? Conceiving that the counsel meant so to contend, he said, he was of opinion, it was not an act of bankruptcy. It was not an assignment of all the party's effects which was an act of bankruptcy; it was an arrangement which a man might enter into from the temporary pressure of his affairs, but would not make him a bankrupt.

Erskine, counsel for the plaintiff, then said, That he meant to contend, that the agreement was void. It was provided that it should be void, if every creditor whose debt amounted to 5*l.*

1800.

JOLLY *et alt.* Assignees of NORTON, *v.* WALLIS.

5*l.* did not sign it; and he should prove, that all the creditors of that description did not sign the agreement: and from thence he contended, that if a trader pays unto the hands of a trustee, money to be divided among the creditors, in the manner settled by any deed or agreement, and the instrument becomes void by reason of all the creditors not coming in, that that money was recoverable back by the assignees, in case of such trader becoming a bankrupt.

To prove this case, he called a witness, who proved, that there were two creditors, one of the name of *Payne*, who was a creditor for 40*l.* who had not signed the agreement; but he admitted, in his cross-examination, That though they had not [231] signed the agreement, they had accepted the notes given for the payment of the instalments, pursuant to it.

Per Lord KENYON. If the creditors have all come in, and taken the security proposed by the agreement for the composition, though they have not actually signed it, I shall hold that they have acquiesced in the composition, and consented to come in under it. It would be so held in the other side of the hall. It is proved, that the only two creditors who have not signed the deed, have, however, accepted of the notes given by the composition: that, in my opinion, binds them. The agreement is therefore not void, and the plaintiffs cannot recover.

Verdict for the Defendant.

Erskine and *Lawes* for the Plaintiff.

Garrow and *Wood* for the Defendant.

MILLER *v.* ARIS.

Dec. 6.

Whereby the regulations of a prison made by the magistrates, certain rates are settled for lodging, &c. within the prison, the gaoler cannot take more than that sum; and if he does, he shall be liable to re-

ASSUMPSIT for money had and received.

Plea of *Non-assumpsit.*

This was an action brought against the defendant, who was governor of the prison in *Cold Bath-Fields*, to recover a sum of money paid by the plaintiff for lodging and victuals while he was confined as a prisoner in that place of confinement.

This prison is under the regulation of the magistrates of the county of *Middlesex*, by whom a *particular code of printed regulations is framed for its government.

By the 25th rule of those printed regulations, "The governor "is allowed to demand of every person committed for safe "custody only, and not in execution, and requiring to be lodged [*232]

1800.

MILLER
ABBS.

fund it, though he has paid it over to the magistrates, to whom he accounts.

"in a better manner than the rest of the prisoners, and able to "pay for a bed, the sum of 1*s*. for a night; and to keep one or "more beds always fit for use, in case such beds should be "wanting." It was proved, That the plaintiff, having had one of those beds while he was in custody, had been charged and paid for it one guinea *per* week: to recover the overplus of which sum, above that settled by the rule, was one of the articles of the plaintiff's demand.

By another of those printed regulations, the governor is prohibited from furnishing the prisoners with victuals, or contracting for the same. The plaintiff during the period of his confinement, had been charged, and paid for victuals: to recover the money so paid, constituted the second article of his demand.

In answer to the demand for lodging, the defendant relied, That he accounted at the sessions to the county for the sums received on account of the gaol; that the charge of one guinea *per* week was sanctioned by usage, and authorised by the justices who passed the accounts: and he gave in evidence the book kept for that purpose, containing the account of the lodging of the several prisoners; and which book was furnished to the magistrates, and contained the charge in question.

[233] The second demand for victuals was completely disproved; it appearing that the cook of the prison was the person solely interested in providing the victuals.

Lord KENYON. For the demand for the victuals, the plaintiff cannot recover: but I am of opinion, that the action is maintainable for the overplus money paid on account of the lodging. It is relied on for the defendant, That he is merely an agent, receiving the money from the prisoners, and paying the produce to the county. The case of *Sadler* v. *Evans*, 4 *Burr*. 1985, is relied on; it has been so laid down by very high authority in that case, that where money has been received by an agent, you cannot sue him, but must have recourse to the principal; but that is where there is no corruption in the foundation of the contract; nor is it bottomed in oppression or immorality.

The rules for the regulation of this prison are properly made; but prisons are not places where prisoners are to have all the conveniences and comforts of life. Gaolers are bound to treat their prisoners with humanity; but the regulations framed for the prison ought to be conformed to. These regulations have pointed

pointed out what sums ought to be taken: it should not be in the power of the gaoler to dispense with those regulations, and to enter into contracts with those in their custody, and under their control: to allow that, might be to sanction oppression. In cases of usury, the person whose necessities prompt him to borrow, will enter into any improvident contract whatever, and submit to any terms, however excessive, to procure money; but the law will protect him, and not suffer it. In this case, I think, the law will interpose in the same way, and not permit such an agreement to be entered into. I am therefore of opinion, that the plaintiff is entitled to recover the money paid for the lodging, above the sum allowed by the regulations.

The defendant's counsel, upon his lordship's thus delivering his opinion, as to the law of the case, offered in evidence a general release given by the plaintiff to the defendant.

It was objected by the plaintiff's counsel: that this could not be given in evidence under the general issue: that besides, it was fraudulent, being given on account of other transactions between the parties, and not on account of the present, or with any view to it.

Lord KENYON said, that it was competent for the defendant, in this action, to give a release in evidence, under the general issue; but that it was also competent for the plaintiff to impeach it on the ground of fraud.

It was accordingly given in evidence, and *Erskine* went to to the jury on the ground of fraud; but the jury found for the defendant.

Erskine and *Lawes* for the Plaintiff.

Garrow, Gibbs, and *Marryatt* for the defendant.

SITTINGS AFTER TERM AT GUILDHALL.

[235]

ROBINSON v. HINDMAN.

If a master turns away a servant, without a previous notice or warning, the servant is entitled to a month's wages.

ASSUMPSIT for servants' wages.

The action was brought by the plaintiff, to recover the amount of a month's wages, on the ground of his having been discharged, by the defendant, without any notice or warning.

No agreement was proved to the effect of the claim; but general usage only was relied on.

The defendant proved, that the plaintiff was negligent in his conduct

1800.

ROBINSON v. HINDMAN.

conduct, frequently absent when his master wanted him, and often slept out at nights.

Lord KENYON said, that though in the present case he thought the plaintiff was not entitled to recover, on account of his misconduct, he was of opinion, that if a master turned away his servant without warning, or previous notice, and there was no fault or misconduct in the servant to warrant it, he ought to have the allowance claimed, of a month's wages; which he thought reasonable.

Verdict for the Defendant.

Garrow and *Peake* for the Plaintiff.

Erskine and *Rose* for the Defendant.

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FOULKES *v.* SELLWAY.

In an action for breach of promise of marriage, where the defence is, that the plaintiff was a woman of bad character, the character which a witness heard of her in the neighbourhood where she lived, is good evidence.

CASE for breach of a promise of marriage.

The defence was,—That plaintiff was a woman of bad character; and evidence was given of one instance of gross misconduct.

The defendant's counsel then called a witness to prove, that she was a woman of general bad character.

The witness gave evidence of his having gone to the place where she lived, to enquire into her character, and was proceeding to state what he had there heard.

Garrow for the plaintiff, objected to this evidence. That the witness should not be allowed to give evidence of what he heard from third persons; if they, from their own knowledge, knew the plaintiff's character, they should be called to state it, and their representations should not be taken at second hand, as the plaintiff was thereby prevented from cross-examining the witnesses as to their reasons for the character they gave.

Lord KENYON said, he was of opinion the evidence was admissible. Character here was the only point in issue. That was public opinion, founded on the conduct of the party, and was a fair subject of enquiry; he therefore thought, that what that public thought, was evidence on the issue as it then stood.

The Defendant had a verdict.

[237] *Garrow* and *Lawes* for the Plaintiff.

Erskine for the Defendant.

1800.

HERNE *et alt.* *v.* HALE.

HERNE *et alt.* *v.* HALE.

A memorandum on the back of a debt, altering some of the terms of it, does not require to be stamped.

ASSUMPSIT to recover the sum of 55*l.* 2*s.* 5½*d.* the difference on the price of stock.

The sister of *Herne*, one of the plaintiffs, being about to marry *Grigg*, the other plaintiff, the defendant agreed to advance 1000*l.* as a marriage portion; and to secure it, the plaintiffs entered into a deed, dated the 1st of *August*, 1792, by which (among other things) they agreed to transfer 2000*l.* three *per cents.* to the defendant; which was accordingly done.

In the month of *January*, 1798, a memorandum was indorsed on the deed, by which it was agreed, that the defendant should not transfer, or otherwise dispose of the stock, without giving six months notice to the plaintiffs. This indorsement was not stamped.

Notice had been given in pursuance of this agreement, and the stock sold; but there being a dispute between the parties, as to what price the stock was to be taken, the present action was brought to try the question.

Garrow, for the defendant, took a preliminary objection to the plaintiff's recovering; that the indorsement on the deed of 1792 was not stamped, and so could not be given in evidence. That it purported to control, and to make an altera- [238] tion in the terms of that deed; so that substantially it was a new instrument, and required a new stamp and the necessary solemnities to give it effect.

Lord KENYON said, he was of opinion, it did not require any stamp; and instanced the case of mortgage-deeds, in which it had formerly been customary to make indorsements, altering the rate of interest from 5 to 4 *per cent.*; on which occasions a new stamp had not been held necessary. His Lordship therefore admitted it in evidence; and the plaintiff had a verdict.

Erskine and *Giles* for the Plaintiff.

Law and *Garrow* for the Defendant.

ROBERT HARRISON, Surviving Partner of THOMAS HARRISON, *v.* FITZHENRY.

Dec. 16.

Where there are several names composing a firm, but part are

DEBT on an indemnity-bond, given by the defendant to *Robert* and *Thomas Harrison*. The bond recited,—That one *Charles M'Carthy* having applied for and prevailed on the plaintiff

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ROBERT HARRISON, Surviving Partner of THOMAS HARRISON, v. FITZHENRY.

nominal only and not interested in the profits, in a declaration on a bond of indemnity, to secure money advanced to a third person, and the breach states the money to be paid by the partners only who are interested in the profits, it is good, though the money was paid on bills drawn on the firm composed of all the partners.

plaintiff and his then partner to open a credit with their house, and to advance money, and accept bills on his account; the condition of the bond was, that if the said *Charles M'Carthy* should not pay all the money which the plaintiff should advance, and all bills of exchange drawn on them on this account, that *within one month after notice given of the said *Charles M'Carthy*'s default to the defendant, or left at his house, that he would pay, &c.

The defendant, after craving oyer of the bond and condition, pleaded *inter alia*—First, That *Charles M'Carthy* had paid all sums of money advanced by *Robert* and *Thomas Harrison* on his account, and all bills drawn by him on them. The plaintiff replied, That he and his partner *Thomas Harrison*, had advanced and paid on account of *Charles M'Carthy*, a large sum of money; to wit, the sum of 1420*l*. and issue thereon. The defendant 2dly pleaded, That he had not had reasonable notice given or left at his house, of the default of *Charles M'Carthy*. Replication, That he had such notice and issue thereon.

The plaintiff proved the payment of several bills drawn by *Charles M'Carthy* on the house of *Robert* and *Thomas Harrison* and Co. and several notes made payable there, drawn in *January*, *February*, and *March*, 1793, at different dates; and which he proved to be paid by them.

[*239] In answer to this the defendant relied, that the house of *Robert* and *Thomas Harrison* and Co. did not consist of those two persons only, but that the firm consisted of them and two other persons of the name of *Nicholls* and *Prickett*. That the bills being drawn on the house of *Robert* and *Thomas Harrison* and Co. and the notes being made payable by them, whatever money was advanced in discharge of either, was the money of *Robert* and *Thomas Harrison* and their partners, and not that
[240] of *Robert* and *Thomas Harrison* only, as the issue stood on the pleadings; and *Erskine*, for the defendant, cited *Myers* v. *Edge*, 7 Term Rep. 254.

It was answered for the plaintiff, and proved by them in evidence, that the two persons of the names of *Nicholls* and *Prickett*, and whose names appeared in the firm, were nominal partners only, and had no interest whatever in the profits, they being paid a certain sum of money annually; and *Barber* v. *Parker*, 1 Term Rep. 287, was cited.

Mr.

1800.

ROBERT HARRISON, Surviving Partner of THOMAS HARRISON, *v.* FITZHENRY.

Where a party becomes security by bond, for the payment of money advanced to a third person, and by the condition of the bond is to pay after notice, if the party has left his house, it is sufficient for the obligee of the bond to make reasonable inquiries after him, and laches are not imputable to him if he does so.

Mr. Justice LE BLANC* ruled this to be a sufficient answer, and to entitle the plaintiff to maintain the action, as surviving partner, in his own name only.

With respect to the second issue on the notice, the evidence was,—That the defendant *Fitzhenry* had become a bankrupt in the month of *March*, 1793, and *Charles M'Carthy* in the *May* following; and the several defaults in payment had been made in the months of *February*, *March*, and *April* preceding; and the sums then paid were those which the plaintiff sought to recover by this action. No notice had been given to the defendant, *Fitzhenry*, of these several defaults, until *August*, 1795. The plaintiff's counsel accounted for this by shewing, that soon after his bankruptcy, the defendant had left his house at *Bristol*, where he had carried on trade: that he had gone to live in *Ireland*, where he had *commenced business in the salt trade, and that enquiries had been made for him, but without effect.

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Mr. Justice LE BLANC. By the condition of this bond, the defendant is entitled to notice of the default in payment by *Charles M'Carthy*, of the sums advanced by the plaintiff on his account; and which notice must be given in reasonable time; and had it appeared that there had been gross negligence on the part of the plaintiff in giving that notice, I should have held that it should discharge him; but gross negligence must have taken place to constitute a sufficient ground to discharge the defendant. In this case I do not think there has been such negligence: however long the interval may be between the default of *M'Carthy* and the notice to the defendant, it is capable of being explained by circumstances. It is in evidence, that the defendant left his house and went to reside in another country, and the plaintiff made enquiries after him, where he used to carry on his trade: this was a reasonable degree of diligence in the plaintiff; and as there is no evidence that he knew where the defendant was to be found, I think he is entitled to recover.

Verdict for the Plaintiff. Damages 1420*l.*

Law, *Gibbs*, and *'Espinasse* for the Plaintiff.

Erskine, *Mingay*, and *Wigley* for the Defendant.

* Lord KENYON was absent during part of the Sittings at *Guildhall*. Mr. Justice LE BLANC sat for his Lordship at *Nisi Prius*.

ABEL

1800.

ABEL v. POTTS. *Dec.* 19

Where, by a memorandum of a policy, the underwriter was to adjust the loss in three months after notice, a direct notice from the assured is not required, if he has had notice by other means.

ABEL *v.* POTTS.

THIS was an action on a policy of insurance on wines, on board the *Danish* ship *Elizabeth,* warranted neutral property, from *Bourdeaux* to *St. Thomas,* as a neutral ship.

Loss by detention of Princes.

The ship was taken by the *French,* and carried into *Guadaloupe,* where, the colony being in want of her cargo, they took it out, and compelled her to take in a cargo of the produce of that island, with which she sailed; she was afterwards captured on the 20th of *September,* 1793, by a *British* ship, and carried into *Nevis,* where the cargo was condemned.

There was a memorandum on the policy. That the loss was to be adjusted within three months after advice of the ship being captured.

The defendant relied on the circumstance, That he had had no notice of the loss of the ship.

The broker who effected the policy was called: he could prove no direct notice having been given to the defendant; but said, He had no doubt that notice had been given.

Lloyd's books are evidence of a capture, not of notice of a loss to any person in particular; but coupled with other evidence, may go to the jury.

The plaintiff's counsel then called for *Lloyd's* book, wherein the capture of the ship was mentioned; and contended, that it was sufficient notice to the defendant.

*Per LE BLANC, Justice. *Lloyd's* book is evidence of a capture, but it is no evidence of notice to a particular person.

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The plaintiff then proved that the defendant was a subscriber to *Lloyd's* coffee-house, and a considerable underwriter; and was in the constant habit of examining the books at *Lloyd's,* in which the capture was entered.

Law, for the defendant, made two points: 1st, That no notice had been given to the defendant sufficient to satisfy the memorandum on the policy, the evidence of notice being insufficient, as well as not being a direct notice from the assured, which he contended to be necessary: 2dly, That the ship having been captured and carried into *Guadaloupe,* there then was a total loss, which the assured ought then to have abandoned, and which they had not done; and the loss, in the declaration, being laid in *Guadaloupe,* no other loss could be taken into consideration.

Mr. Justice LE BLANC. As to the first point made by the defendant's counsel, it does not strike me that the communication

cation of the loss should necessarily come from the assured; I think that if the underwriter had notice by any means of the loss of the ship, that that would satisfy the memorandum of the policy. With respect, therefore, to the evidence of notice, it is this,—There is evidence that the loss of this ship was publicly known; that she stood on *Lloyd's* books as a capture; and that the defendant was a subscriber to *Lloyd's*, and in the habit of daily examining the books. Was the defendant [244] the only underwriter in *Lloyd's* coffee-house ignorant of the capture? In addition to this, there is the evidence of the broker, who swears that he believes the defendant had notice, though he cannot speak to it in direct terms. I think this evidence sufficient to go to the jury. With respect to the second point, That the assured ought not to have taken to the second cargo which was imposed on him, but to have abandoned it,—the proposition of law is a true one, that if there is at any time a total loss, and afterwards any change of circumstances takes place, the assured is bound to make his election; and he cannot try to take advantage of it, and to be determined by the event, if it is profitable or not; but to make this rule of law attach on the case, it must appear that there was a time when the assured was conusant of the change of circumstances. There is no evidence of the plaintiff's having taken to the second cargo. It does not appear that the assured had any notice of the loss until the vessel was captured and carried into *Nevis*, on her second voyage: At that time, therefore, he had nothing to abandon. I am therefore of opinion, that the policy is not discharged, by reason of the plaintiff's not abandoning.

Upon the first notice of a total loss, the assured are bound to abandon; but it must appear that they had notice or the policy will not be vitiated.

The jury found a verdict for the Plaintiff.

Erskine Gibbs, and *Giles*, for the Plaintiff.

Law, *Adam*, and *Park*, for the Defendant.

*WOOD *et alt.* Assignees of PEARCE, *v.* THWAITES.

Saturday, Dec. 20.

TROVER for a lease.

To prove the act of bankruptcy, the plaintiffs called a witness, who gave in evidence, that a creditor called on the bankrupt: he was then at home, and was by his own direction, denied to the creditor, who thereupon said, "he would "wait for eight hours, or see him." After much importunity, the bankrupt did consent to see him.

A denial to a creditor, though the debtor afterwards sees him on the same day, is an act of bankruptcy.

This [*245]

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Wood *et alt.* Assignees of Pearce, *v.* Thwaites.

This was put to Mr. Justice Le Blanc (who sat for Lord Kenyon) as amounting to an act of bankruptcy.

His Lordship said, here is a denial to a creditor, that is an act of bankruptcy; and it is not purged by the bankrupt's seeing him afterwards, though in the course of the same day.

The defence set up was, that *Pearce* had a partner of the name of *Elwin;* that the lease was the joint property of *Pearce* and *Elwin;* and that *Elwin* had authorized the defendant to retain it.

Le Blanc, Justice, ruled it to be a good defence.

Law, Perceval, Adam, and ——— for the Plaintiffs.

Garrow and *Gibbs* for the Defendant.

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Same day.

Kershaw *et alt. v.* Cox.

Where a bill of exchange was put into circulation by indorsement, though it wanted the words "or order," the insertion of those words by the drawer, with the consent of the parties, neither vitiates the instrument, nor makes a new stamp necessary.

THIS was an action of assumpsit, brought to recover the value of a bill of exchange.

The bill was drawn by *Collier* and Son, in favour of the defendant, who had indorsed and delivered it to one *Kershaw,* who was the son of one of the plaintiffs: he was indebted to the plaintiffs at the time; and remitted it to them in discharge of his debt.

The bill was dated the 1st of *August.* On the 2d of *August* the bill was sent back by the plaintiffs, on discovering that the words "or order" were wanting; so that the bill could not be negotiated by indorsement.

On receiving it back, *Kershaw,* the son, applied to the defendant, who referred him to *Collier;* by whom the words "or order" were inserted. This was all done on the 2d of *August,* on which day the bill was returned to the plaintiffs.

The bill became due the 4th of *November.* On the 16th of *August* preceding, *Kershaw,* the son, was informed by the plaintiffs, that the bill had been refused acceptance; and he gave notice of it immediately to the defendant who insisted that the bill was a good one, and would be paid.

Before the bill became due, *Walley,* the drawee, and *Collier* became bankrupts. On the 7th of *November, Kershaw,* the son, received back the bill from the plaintiffs, noted for non-
[247] payment: he took it immediately to the defendant, who refused to pay it.

The bill was properly stamped.

Erskine

1800.

KERSHAW *et alt.* *v.* COX.

Erskine, for the defendant, contended, that the plaintiff should be nonsuited: he relied, first, On the case of *Masters* v. *Miller*, 4 Term Rep. 320, That the defendant did not consent to the alteration by *Collier*, which brought it within the case cited. That the alteration was in a material part, as it might change the right of set-off, by making that negotiable which was intended to go only in a particular account: but if it was not within that case, it was within the case of *Bowman* v. *Nicholls*, 5 Term Rep. 537; and a new stamp was necessary, by reason of the alteration in the instrument.

Mr. Justice LE BLANC. It can hardly be contended that the defendant did not consent to the alteration, making this a negotiable bill, as he himself indorsed it, and so considered it as negotiable; but this I will leave to the jury. As to the stamp, I think no new stamp was necessary. This was not a new instrument, as in the case of *Bowman* v. *Nicholls*, but merely a correction of a mistake, and in furtherance of the original intention of the parties. It would be different if the alteration had been in the date, or of the time when it was to be paid; that would be a material part; this, in my opinion, is not so, and does not vitiate the bill.

The jury said, this sort of alteration was very common; and found a verdict for the plaintiff.

Lawes and *Littledale* for the Plaintiff.

Erskine and *Garrow* for the Defendant.

A new trial was moved for in the course of the next term; [248] but the court refused a rule to shew cause.

PARKINS *v.* CARRUTHERS *et alt.*

Same day.

Where a partnership has existed, but one of the partners has retired without notice being given in the Gazette, and the name of the firm is still preserved; a person dealing with the firm after the

ASSUMPSIT on a promissory note for 800*l.*, signed by *Joseph Parkin*, one of the defendants, drawn the 10th of *July*, 1798.

It appeared, that on the 29th of *April*, *John Campbell*, one of the defendants, retired from the partnership, and never after intermeddled with the trade; and the bill was drawn after he had so retired; but no notice of his retiring was published in the *Gazette*.

The defence was,—That the note was given for the separate account of *Joseph Parkin*, and not on the partnership account.

Erskine, for the defendant, contended, that notice in the *Gazette* could only affect antecedent transactions; but if a partner

1800. PARKIN v. CARRUTHERS et alt.

dissolution, may still call upon all the original parties, unless he had notice, or knew that one of them had retired.

partner had retired from a firm, a party who never dealt with the house whilst such partner was in the firm, could not call upon the credit of such person as a partner, when in fact he was not so: admitting the principle, that if the person had dealt with the house before, if the dissolution of the partnership had not been made public, the party still continued liable; the notice in the *Gazette* could only apply to those who dealt with the house before.

Law, on the same side. The only evidence of the partnership is by the deed of dissolution that *was in *April*, 1798, and by that the partnership was recited; so that by the same [*249] instrument, by which it was proved that he was a partner, it appeared that he had ceased to be so at the time the note was drawn.

Gibbs, on the same side. The money was paid to *Joseph Parkin* as agent for the plaintiff by Mr. *Booth*, who had that money to pay to the plaintiff: and as he paid it to *Joseph Parkin*, the defendant, who was one of the partners, this was legal notice to *Thomas Parkin*, the plaintiff, that *John Campbell* was out of the partnership, as his agent knew it.

LE BLANC, Justice. Is not this a question for the jury? The firm continues the same. Have you made *Joseph Parkin* an agent?

Gibbs. I have constituted *Joseph Parkin* an agent; he received the money for his brother.

LE BLANC, Justice. The principle on which I proceed is this:—That there was a partnership subsisting, under the firm of *Parkin, Campbell*, and Co. which continued after the retirement of *John Campbell*. The rule of law is clear, that where there is a partnership of any number of persons, if any change is made in the partnership, and no notice is given, any person dealing with the partnership, either before or after such change, has a right to call upon all the parties who at first composed the firm.

In summing up to the jury, his Lordship laid it down as the law on the subject, That if the plaintiff advanced the money, even after the time that one of the partners had re-[250] tired, if he did not know of such retirement, he had a right to sue all who before constituted the partnership. In point of fact in this case, *John Campbell* had retired; but still if this was really a partnership, and the money was lent to the persons carrying on trade under that firm, all were liable.

His

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PARKIN v. CARRUTHERS et alt.

His Lordship added, I agree with the defendant's counsel, That if this money was lent by the plaintiff to his brother, and he lent it to the partnership, the plaintiff cannot recover; or if *Joseph Parkin* was agent to his brother, and he in that character lent the money, it cannot be recovered, because *Joseph Parkin*, the agent, had notice that *John Campbell* was not then a partner.

Garrow, Park, and *Scarlett,* for the Plaintiff.

Erskine, Law and *Gibbs,* for the Defendant.

SITTINGS AFTER TERM IN THE COMMON PLEAS AT WESTMINSTER.

RAWLYNS *v.* VANDYKE.

Dec. 2.

The husband is not liable for necessaries furnished to his wife, after a tradesman had notice from the husband that she had a separate maintenance; but it is incumbent on the husband to shew that the tradesman had such notice.

ASSUMPSIT for the lodging of the defendant's wife and children; and for goods sold and delivered to them.

The plaintiff proved the lodging of the parties at his house, and the furnishing of linen-drapery goods to the wife and children of the defendant; which appeared to be necessaries for them.

*The defence was,—That the defendant and his wife lived separate: That he allowed her ten guineas a week: That the plaintiff had notice of those circumstances, and not to trust her: but the notice not to trust her, was said by the plaintiff to have taken place after the bill for the goods had been delivered.

[*251]

It was further contended, that there was no evidence that the husband had refused to receive her. But it was given in evidence, that Mr. *Vandyke*, the plaintiff, had supported a separate establishment for his wife at *Bath*, where he had visited her once, and at *Osborn*'s hotel in *London*; and paid the bills at both places.

Lord ELDON said, The defendant's counsel relies on his discharge from this action, first, On the ground of his living apart from his wife, and there being no evidence that he refused to receive her. My conception of the law is this: That if a man will not receive his wife into his house, he turns her out of doors: and if he does so, he sends with her credit for her reasonable expenses. In this case Mr. *Vandyke* has lived apart from his wife, but he has paid her expenses incurred in

1800. — RAWLYNS v. VANDYKE.

that situation in other places, and has therefore given her credit.

The second ground taken by Mr. *Vandyke*'s counsel is, That he gave her a separate maintenance; informed the tradesman of that fact, and gave him notice not to trust her. Separation, with a separate maintenance, was formerly held sufficient to charge the wife; but it is not so held now; the wife is not now liable; but it is a different thing to hold the wife not to [252] be liable and the husband to be liable: the object of this action is to make the husband liable. If the husband gives express notice to a tradesman not to trust his wife, he shall not be charged for goods furnished to his wife: and if a tradesman has notice of a separate maintenance given to the wife it is the doctrine of Lord HOLT, that that shall be notice of an express dissent on the part of the husband, and he shall not be charged; but where the tradesman's demand is for necessaries, it is incumbent on the husband to shew that the tradesman knew of the separate maintenance.

The question therefore will be, Did Mr. *Vandyke* dissent from furnishing his wife with the things charged? I am of opinion, that for every thing furnished after notice of the separate maintenance, that that amounted to a dissent; and for those, that the defendant is not liable.

If a husband living in a state of separation from his wife, suffers his children to reside with their mother, he is liable for necessaries furnished to the children.

With respect to the things furnished to the children, I do not lay it down as the law—that where the children live away from the father, that he is liable, because the things furnished are necessaries; As a father, he has a right to the custody of his children, and may obtain possession of their persons by *habeas corpus;* but where he does not assert that right, and suffers them to remain with their mother, I think he thereby constitutes her as his agent, and authorises her to contract those debts for clothing and other necessaries; but this I think should be left to the jury.

The jury found for the Plaintiff.

Cockell, Serjeant, and *Parke* for the Plaintiff.

Best, Serjeant, for the Defendant.

Dec. 7.

*NORMAN v. COLE.

Assumpsit will not lie to recover back money deposited for the [*253]

ASSUMPSIT for money had and received.

The action was brought to recover a sum of 30*l.* which had been deposited in the hands of the defendant, under the following circumstances:—

One

1800.

NORMAN v. COLE.

One *Tunstall* being under sentence of death in *Newgate*, the plaintiff was prevailed upon to lodge that sum in the hands of the defendant, to be applied to the purpose of procuring him a pardon.

purpose of being paid to a person for his interest in soliciting a pardon for a person under sentence of death.

On the case being opened, Lord ELDON expressed a doubt whether the action was maintainable, saying, that he would hold the plaintiff to very strict proof of the means used to procure the pardon; and called on the plaintiff's counsel to shew upon what grounds they founded their right to recover.

They stated, that *Tunstall* was a man of good character before his conviction: that one *Morland* being a person of good connexions, and having access to persons of interest, the money was to be given to him for so using his interest, by representing, in favourable terms, the case and character of *Tunstall*.

Per Lord ELDON. I cannot suffer this cause to proceed. I am of opinion, this action is not maintainable; where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money: the doing an act of that description should proceed from pure motives, not from pecuniary ones. The money is not recoverable. [254]

The plaintiff was nonsuited.

Cockell, Serjeant, and *Lawes* for the Plaintiff.

Best, Serjeant, and *Reader* for the Defendant.

HILL, one &c. *v.* HUMPHRYS.

An attorney's bill for business, must be left at his client's dwelling-house, if not personally delivered; a delivery at his compting-house is not sufficient within the stat. 2 *Geo.* II. c. 23.

THIS was an action of assumpsit, brought by the plaintiff, who was an attorney, to recover the amount of his bill, for business done for the defendant.

The plaintiff proved the making out and delivery of his bill, and the business done; and that it had been left at the defendant's house one month before the action brought; but it appeared that it had been left at the defendant's compting-house.

It was objected by the defendant's counsel: that this delivery was not conformable to the statute, 2 *Geo.* II. chap. 23, which required a personal delivery, or the bili to be left at his dwelling, or last place of abode.

It was contended for the defendant, that the compting-house house was to be deemed a dwelling within the words of the statute, as the defendant must have inhabited it while doing

 his

1800.

Hill onc, &c. v. Humphrys.

his business; and that the requisition of the statute was therefore satisfied.

Lord Eldon said, that he was of opinion that the true construction of the act required a delivery *at the dwelling-house, if there was not a personal delivery; and that the delivery at the [*255] compting-house was therefore insufficient; and nonsuited the plaintiff.

Shepherd, Serjeant, and *Barrow* for the Plaintiff.

Cockell, Serjeant, for the Defendant.

SITTINGS AFTER TERM IN THE COMMON PLEAS AT GUILDHALL.

Ewers v. Hutton.

A separate maintenance secured by a deed executed by the husband and wife, but not by her trustee, is void: and such a separate maintenance is no answer to an action brought for necessaries furnished to her, after having left her own house, though she solicited to be received again by her husband.

THIS was an action of Assumpsit to recover a sum of money for the maintenance and support of the defendant's wife.

It was proved that the defendant had treated his wife with much barbarity, and turned her out of doors; that the plaintiff received her into his family, and furnished her with necessaries; for which the present action was brought.

There was also evidence given, that some time after the wife had been turned out, she returned and rung at the bell: the defendant went down to the door and refused to admit her.

It was proved, that the wife had had between 3 and 400*l*. fortune when she married.

The defence was,—That the absence of the wife for part of the time, was an elopement; as she *might have returned to her husband's house: 2dly, That a separate maintenance was secured to her, some time after her leaving her husband's house. To prove which, the defendant gave in evidence a deed of separation, executed by the husband and wife; but it [*256] was not executed by the wife's trustee, who was a party to it.

Lord Eldon said, there was no doubt of the law, that where a husband, either from ill-treatment, compelled his wife to leave his house from motives of personal safety, or turned her out of doors, that any person who afforded her protection, and furnished her with necessaries correspondent to his rank and situation in life, could compel the husband to pay for them; but that in ascertaining what suited his circumstances, the fortune which the wife brought could not enter into the consideration:

sideration: the jury were to regulate their verdict by what the husband's circumstances were when the separation took place. 1800.

EWERS v. HUTTON.

As to the question of elopement, it did not appear clearly, whether the term *elopement* in the books, meant an adulterous elopement or not: here there was no imputation of an adulterous elopement; but it was settled in a case in Lord *Raymonds'* Reports, to which he subscribed, that if the wife had eloped, and afterwards solicited to be received again, and the husband refused to receive her,—from that time he was bound for necessaries furnished to her; and that seemed to be the case, taking it even to have been a voluntary elopement by her.

As to the deed of separation produced, it was waste paper, [257] —it was binding in no degree; it was executed by the husband and wife; but the wife had no will of her own; she could execute no deed; she could not covenant with her husband; she could only contract by the means of a trustee, who became bound for the performance of what she contracted to do: here he had not executed the deed. The husband could not therefore be sued; and the deed was of no avail.

His Lordship therefore concluded with observing, that the wife having solicited to be received into the defendant's house, and being refused by him, he was bound to provide her with necessaries; and that the deed of separation furnished him with no defence.

Verdict for the plaintiff.

Shepherd, Serjeant, and *Lawes* for the Plaintiff.

Best, Serjeant, and *Barrow* for the Defendant.

IN THE COMMON PLEAS.
SITTINGS AFTER TERM AT GUILDHALL.

WOOLF v. CLAGGETT.

Dec. 13.

When sickness of the master or crew is set up as an excuse for deviation, it is incumbent on the plaintiff to shew that

ASSUMPSIT on a policy of assurance, on a *Danish* ship from *Altona* to *Surinam*.

The defence relied upon, was deviation. The ship, in the course of her voyage, had put into the *port of *Plymouth*, which was out of the common course of her voyage, where she remained fourteen days.

The answer set up by the plaintiff to this was, that after the ship had sailed, the captain was taken ill with a severe fit of [*258] the

1800.

Woolf v. Claggett.

proper medicines and necessaries for the voyage were on board, in a case where the nature of the voyage requires that there should be a surgeon on board.

the gravel: That the mate having pricked his finger, by accident, his hand and arm swelled to such a degree, as to render him incapable of doing his duty; and that they put into *Plymouth* for the purpose of procuring medical assistance. The facts of the illness of the Captain and Mate, of their going into *Plymouth*, and applying to a surgeon there, were proved; but it appeared on the cross-examination of the witnesses, that the surgeon of the ship was unprovided with the proper instruments and medicines. He was not called; but the surgeon at *Plymouth* proved that the medicines administered on board were only common alterative pills, and that some lint had been used.

After the defendant's counsel had addressed the jury for some time, Lord Eldon interposed.

His Lordship said, that it appeared to him, that the plaintiff had not made out his case. It was admitted that *Plymouth* was not in the regular course of the voyage insured; but the plaintiff justified the deviation from necessity. Necessity was in some cases an excuse for deviation; and he did not know that the excuse set up here, had ever been admitted to be a sufficient one. He was of opinion, that if, by the visitation of God, so many of the crew, who were otherwise sufficient, be-[259]came so afflicted with sickness, as to be incapable of navigating the ship, such an illness of the crew was a necessity, which might justify a deviation; but when it was set up as a justification of a deviation, he thought it incumbent on the plaintiff to shew that he had provided against what was so the act of God, by every proper precaution, as to medicines and necessaries for the voyage, as much as he was bound with respect to the tightness of the ship. It was in evidence, that a surgeon was necessary in such voyages as the one insured; If, therefore, sickness was to be set up as an excuse for deviation, the plaintiff should shew that the surgeon was provided with such medicines and instruments as would probably become necessary in the course of the voyage, arising from the common casualties of mankind. He thought, in the present case that had not been done: the surgeon at *Plymouth* was proved to have lanced the arm. Had the surgeon on board no lancet? The medicines too furnished by him, were of the most common kinds; and it was even proved, that though the captain was afflicted with the gravel, the ship's surgeon was unprovided with a syringe, though an instrument so necessary for that

that complaint. He was also of opinion, that the necessity for going into port ought to be made out by the plaintiff beyond all possibility of doubt, and that it did arise and exist without any default of the master or party insuring; and if they did come in for medical advice, he should expect that medical men should be called, to prove that such necessity did exist. [260] The surgeon at *Plymouth* had proved no such thing; and his Lordship added, that he therefore thought the plaintiff had failed in proving his justification for the deviation.

The plaintiff was nonsuited.

Shepherd, Serjeant, *Bailey*, Serjeant, and *Lawes* for the Plaintiff.

Lens, Serjeant, *Best*, Serjeant, and *Onslow*, Serjeant for the Defendant.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

HILARY TERM, 41 GEO. III.

IN THE KING'S BENCH.
FIRST SITTING IN TERM.

Jan. 28.

ESTE v. BROOMHEAD.

If to debt on the bond for securing an annuity, the grantor pleads that it is void for a defect in the memorial under the stat. 17 Geo. III. and the grantee submits to that plea and enters a *noli prosequi*, the grantee may immediately maintain an action for money had and received.

ASSUMPSIT for money had and received.

The action was brought to recover the sum of 150*l.* which had been paid as the consideration of an annuity.

The defendant's counsel objected: That the plaintiff could not recover the consideration, as the annuity had not been set aside.

To this it was answered, That admitting it to be necessary for the grantor of the annuity to set it aside before the grantee could sue in this action; in this case he had done what was tantamount to it; for the grantee, the present plaintiff, had brought an action on the bond given for securing the annuity, which was the sum which had been paid for it: that to that action on the bond, the defendant had pleaded that the bond was void, by reason of a defect in the memorial, *under the annuity act of 17 *Geo.* III.: That the plaintiff, knowing the plea to be true, had entered a *noli prosequi;* so that the defendant had relied on its being void; had had the benefit of his plea to that effect; and that he should not now be allowed to consider it valid and subsisting.

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His Lordship acquiesced in the distinction, and the plaintiff recovered.

Garrow, *Onslow*, Serjeant, and *Beauclerk* for the Plaintiff.

Erskine and *Dampier* for the Defendant.

Vide *Weddell* v. *Lynam*, ante 1st vol. 309.

SECOND

1801.

REX v. LAWSON and others.

SECOND SITTING IN TERM.

REX v. LAWSON and others.

Under the general authority given by the appointment of constables and surveyors to the Shadwell police-office, they cannot take a person into custody without a special warrant.

THIS was an indictment against the defendants: The first count was for an assault on the prosecutor, charging him as a constable belonging to the *Thames* police-office; the second, for a common assault.

By the stat. 39 and 40 *Geo.* III. ch. 87, the Police-office was established at *Shadwell*: by that act, justices are appointed to that office, and a power is given to them to appoint persons as constables and surveyors. One of the prosecutors was appointed a constable, and another person of the name of *Cowen*, surveyor. The defendants were the mate and part of the crew belonging to the ship *Cygnet*, then lying in the *Thames*.

[263]

In consequence of an information, the constable and *Cowen* the surveyor went on board the ship, and found a considerable quantity of coffee and sugar, which they seized; they departed, but desired the defendants to attend at the police office the next day. The defendants neglected to do so; in consequence of which, the constable and *Cowen* went on board the day following, when the defendants refused to attend. The constable endeavoured to seize *Lawson* the defendant; when a scuffle ensued, and the officers were driven from the ship. For this assault the present indictment was preferred.

In the course of the evidence of *Cowen*, it appeared that the defendant *Lawson*, when the officer came on board, asked for his authority; he produced a parchment, which was his appointment to the place of surveyor, in which was mentioned the several parts of his duty. The parchment was produced. Lord KENYON asked, If they had any warrant or other authority to take the defendants into custody?

Being answered in the negative, his Lordship proceeded:— I think there must be an acquittal. After first finding the goods, the defendants were suffered to go at large; the justices should have issued their warrant, grounded on an information, authorising the officers to take the defendants into custody, and bring them before the magistrates: that has not been done. The surveyor and constable went on board without any authority, except that derived from the appointment

of

1801. — Rex v. Lawson and others.

of the former, which is in the nature of a general warrant. I do not approve of general warrants; they have been repro-*bated a century ago. I think the prosecutor had no authority to take the defendants into custody; and they must be acquitted.

[264] *Garrow*, the Common Serjeant *Silvester*, *'Espinasse*, and *Knapp* for the Plaintiff.

Erskine and *Gurney* for the Defendants.

SITTINGS AFTER TERM AT WESTMINSTER.

Feb. 14.

EDMONDSTONE *v.* WEBB.

If a bankrupt pleads his bankruptcy in bar, and the plaintiff relies on its having been obtained by fraud, by allowing persons to prove debts who were not bona fide creditors, such persons are witnesses to prove the fraud, and should be called.

THIS was a *scire facias* on a judgment.

The defendant pleaded his bankruptcy; and relied on his certificate, that the cause of action accrued prior to it.

The plaintiff impeached the certificate, on the ground of fraud.

The fraud relied on was,—That persons had been admitted to prove debts under the defendant's commission, and to sign his certificate, who, in fact, were not creditors, but who swore to fictitious debts, in order to entitle them to sign it. That by stat. 24 *Geo.* II. chap. 57. sect. 9, it is enacted, " That " where any person shall fraudulently swear or depose before " the major part of the commissioners named in any commis- " sion of bankruptcy, or by affidavit or affirmation exhibited " to them, that a sum of money is due to him or her from any " bankrupt or bankrupts, which shall, in fact, be not really, " and, in fact, so due and owing; and shall in respect of such [265] " fictitious or pretended debt, sign his or her consent to the " certificate for such bankrupt's discharge from his debts,— " in every such case, unless such bankrupt shall, before such " time as the major part of the said commissioners shall have " signed such certificate by writing, by him to be signed and " delivered to one or more of the said commissioners, or to " one or more of the assignees of his estates and effects under " such commissions, disclose the said fraud, and object to the " reality of such debt; such certificate shall be null and void " to all intents and purposes, and such bankrupt shall not, in " that case be entitled to be discharged from his debts, or to

"have or receive any of the benefits or allowances given or "allowed to bankrupts by the said act of the fifth year of his "Majesty's reign; any thing therein contained to the contrary "thereof in anywise notwithstanding." 1801. EDMONSTONE v. WEBB.

The plaintiff's counsel then proposed to prove, by collateral evidence, That several of the debts were fraudulent; particularly in the case of one *Henley*, who had proved a debt under the commission. His debt they proposed to impeach, by shewing that he had himself become insolvent, and assigned his effects to a trustee; that by such means they had become possessed of his books; by reference to which it would appear that *Webb*, the bankrupt, did not owe to *Henley* the debt which he had proved under the commission.

They also offered, by similar evidence, to impeach the debts of others.

The defendant's counsel objected: That this was attempting to do by indirect, what could be done by direct evidence; that was, by calling the parties themselves who had proved their [266] debts and by examining them as to the actual state of their accounts when the debts were proved.

It was answered by the plaintiff's counsel, That it would be improper to call such witnesses, who must be perjured on one side or other; inasmuch as if they came forward as witnesses on the trial, to prove, that at the time when they swore to the debt under his commission, *Webb* was not indebted to them, they would be entitled to no credit.

Lord KENYON said, that that objection should lie in the mouth of the defendant, not of the plaintiff; and he thought they ought to be called; their testimony being certainly open to much observation.

One witness of that description was called, who established the fact of fraud; and the plaintiff had a verdict.

Gibbs and *Lawes* for the Plaintiff.

Garrow for the Defendant.

BARLOW v. BISHOP.

Feb. 17.

ASSUMPSIT by the plaintiff, as indorsee of a promissory note, made by the defendant, payable to *Ann Parry*, and by her indorsed to the plaintiff, with the common money-counts.

Where a note is given to a married woman, to pay a debt contracted by her in the way of

Plea of *Non-assumpsit*.

The

1801.

BARLOW v. BISHOP.

a separate trade carried on by her, and she indorses it, the indorsee cannot recover: the plaintiff should declare on it as a note payable to the husband; and her indorsement might be good on proving that he allowed her to do so in the way of her trade.

The defence was,—That the plaintiff made title through *Ann Parry*, who was a married woman; and who for that reason could not indorse the note; that when the note was given, it at that moment * became the property of the husband; so that by no act of the wife could that property be transferred from him to another.

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Lord KENYON said, on this objection being taken, That the plaintiff should have declared on the note according to its legal effect; that is, as a note payable to the husband; and if it appeared that the husband had allowed the wife to indorse bills and notes on his account, the plaintiff might then have relied on the indorsement by the wife.

The plaintiff proved, That the wife carried on the business of a milliner, at *Birmingham;* and the consideration of the note was haberdashery goods, furnished by the plaintiff, who was a haberdasher in *London:* That she had dealt with the plaintiff in her own name: That she had given a note for the money in her own name: That the present note was given by the defendant, on being informed that the former note could not be negociated with full knowledge of all the circumstances; and cited *Israel* v. *Douglas*, 2. *H. Black.* 239.

Lord KENYON said, He was afraid the plaintiff could not recover on the note, on account of the indorsement; but that he would reserve the point, Whether he could not recover on some of the money-counts?

Erskine and *'Espinasse* for the Plaintiff.

Gibbs for the Defendant.

In the next Term this was moved; when the court were of opinion, that the plaintiff could not recover.

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WELDON v. GOULD.

Callico-printers have a lien for a general balance on goods delivered to them to print.

TROVER for a quantity of callicoes.

Plea of Not Guilty.

The case was,—That the plaintiff had delivered the callicoes to one *Pearce*, to have them printed; he delivered them to the defendant, who was a callico-printer: the defendant did not know that the goods did not belong to *Pearce;* and he kept the goods for the balance of a general account between *Pearce* and him.

The plaintiff's counsel contended, 1st, That the defendant had

1801.

WELDON v. GOULD.

had no right to hold the goods for the general balance: and, 2dly, That even so, the defendant could not hold the goods, as they were not the property of *Pearce;* and that the lien, if any, could extend only to cases of the goods of the party himself.

Lord KENYON said, That he thought the plaintiff had a lien for a general balance; and that the same point had been before decided, that callico-printers had such a lien; but that it must be for work done in the course of that business, for which the lien was claimed;—they could not claim a lien for money lent, or for any collateral matter: it should be confined to work done in the particular business. As to the second point, he was of opinion, That if the goods were taken in by the defendant as the goods of *Pearce,* who was his debtor, and ignorant that the property belonged to another, he thought the lien extended to those goods, and gave the defendant a right to hold them. It was like the case of a factor, where, if the person who deals *with a factor, receives goods from him as his own, he has a right to hold them for a debt due by the factor, and against the rightful owner; and cited *George* v. *Claggett,* 7 Term Rep. 359.

Where callico goods are delivered to a person to have them printed, and such delivers them to a callico-printer for that purpose, to whom he is then indebted; the callico printer may hold these goods against the owner, by virtue of his lien.

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It would therefore be necessary for the defendant to shew, that there was such a balance due to the defendant, as entitled him to hold the goods as a lien. The defendant did give that evidence, and had a verdict.

Garrow and *Marryatt* for the Plaintiff.

Erskine and *Wood* for the Defendant.

LIMLAND *v.* STEPHENS.

If a master of a ship by inhuman treatment compels a sailor to quit a ship, it is not such a desertion as shall amount to a forfeiture of his claim for his wages for the voyage performed.

CASE for seaman's wages.

Plea of *Non-assumpsit.*

The plaintiff and defendant were natives of *Sweden.* The plaintiff had entered on board the ship at *Stockholm.* The articles were out and home. She had made a circuitous voyage, and arrived in the *Thames* in *December,* 1800. The defendant had assaulted and beat the plaintiff several times in the course of the voyage; and had put him before the mast as a common sailor, though he had been hired in the capacity of mate. The plaintiff applied to the *Swedish* consul, stating his situation, but nothing was done; the consul only desiring the defendant to attend him; which he refused to do.

The

1801.

LIMLAND v. STEPHENS.

The defence relied on was,—That the plaintiff being a sailor, had hired with the defendant, under articles; by which the defendant was bound, under a penalty, to bring back his crew to *Sweden;* so that no action could be maintained in *England*, or until the completion of the voyage.

Lord KENYON. There are reciprocal duties between masters and servants. From the servant is due obedience and respect; fromt he master protection and good treatment. Desertion is a forfeiture of wages; but if the captain conducts himself in such a way as puts the sailor into that situation, that he cannot without damage to his personal safety continue in his service, human nature speaks the language,—a servant is justified in providing for that safety. After the plaintiff had been with the consul he communicated to the defendant the wish of the consul to see him. The captain said, "He "would go when it suited him;" and being pressed by the plaintiff to do so, he beat the plaintiff very severely; threw a log of wood, which hurt his foot. The plaintiff left the ship; and the defendant was heard to say, That if he returned, he would chain him to the mast, and bring him to *Sweden*.

Erskine. The plaintiff cannot justify a desertion by reason of the defendant having beat him; for that, he could have an action of assault, which is a proper remedy. In this case the plaintiff sailed under articles, by which the captain is bound to bring back his crew to *Sweden*, under a penalty; and the sailor forfeits his wages by desertion.

Lord KENYON. Is a man bound to serve at the peril of his life? Desertion is an answer to the seaman's claim for wages; but that must be a voluntary act of the seaman's, and not be
[271] caused by any act of the captain. In this case, the act of the captain has made the dissolution of the contract necessary and, in my opinion, justifiable on the part of the sailor; and, I think, he is entitled to a verdict.

Verdict for the Plaintiff.

Garrow and *'Espinasse* for the Plaintiff.

Erskine and *Wigley* for the Defendant.

MESNARD

1801.

Feb. 21.

MESNARD v. ALDRIDGE.

The conditions of the sale by auction, printed and pasted up under the auctioneer's box, where he declares that the conditions are as usual, is sufficient notice to purchasers of the conditions.

MESNARD v. ALDRIDGE.

THIS was an action on the case, on the warranty of a horse.

The horse was sold by the defendant, by auction, at his repository, and warranted sound.

The sale took place on the *Wednesday*. At the time of the sale, the auctioneer announced that the conditions of the sale were as usual.

These conditions of sale were proved to be contained in a printed paper, pasted up under the auctioneer's box; and by one of them, all horses purchased there, in case of any unsoundness discovered, are required to be returned before the evening of the second day after the sale.

The horse in question was not returned till the *Saturday*. When returned by the plaintiff, he was informed that it was too late, as he ought, pursuant to the conditions of the sale, to be returned on the evening of *Friday*.

Erskine, for the plaintiff, contended, That there was no evidence of notice of the conditions of the sale, sufficient to bind him. That the auctioneer had not proclaimed them publicly; so that the plaintiff might have been ignorant that he purchased under such conditions. But, at all events, he contended, That if the defendant, who was not the owner of the horse, had not paid over the price (which if he had, he admitted he would not have been liable) that he remained subject to this action, on the warranty. [272]

Lord KENYON. In this case it is proved, that printed particulars of the sale are pasted up in the public sale-room, under the auctioneer's box. In the case of carriers, who advertise that they will not be liable for goods lost above the value of 5*l.* unless entered as such, the posting up of a bill in the coach-office to that effect has been held to be sufficient. I therefore think the same mode being adopted here, gives the same degree of notice to all persons who come to this sale; and that it is a sufficient notice of the conditions under which the horses are sold.

With respect to the main point, When parties enter into a special agreement, they must adhere to the terms of it. Here there is a condition, That the party purchasing, must return the

1801. the horse within two days; which he has not done. I therefore think the plaintiff must be nonsuited.

MESNARD v. ALDRIDGE.

Erskine, *Garrow*, and *Reader*, for the Plaintiff.

Law and *Gibbs* for the Defendant.

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CARY v. LONGMAN.

If an author makes very considerable additions to a work before printed, he obtains a copy-right in the additions, and can maintain an action for an infringement of it.

THIS was an action on the case, brought to recover damages for infringing the copy-right of a book called *Paterson's Itinerary, or Book of Roads*, belonging to the Plaintiff.

The defendant had been the proprietor of an *Itinerary, or Road Book*, called *Paterson's*. In the contract for the mail-coaches, many disputes having arisen concerning the actual distances of places in *England* and *Wales*,—in the year 1793, a Mr. *Hascar*, who was then superintendant of the mail-coaches, engaged with the plaintiff to make an actual survey of the roads, by the direction of Lord *Walsingham*, who was then one of the postmasters-general. The agreement under which the plaintiff engaged was, to be paid 9*d*. per mile, with every assistance which he could have from the post-office and post-masters all over the kingdom; and he was to be entitled to all the benefit to be derived from the sale of the book.

Paterson's Book of Roads was first published in 1771. It went through many editions; and in 1796, the eleventh edition was published. In 1798, *Cary* the plaintiff, published his Itinerary from his survey; and though there were in it several very great improvements, he had borrowed a great deal from *Paterson*. In 1799, the twelfth edition of *Paterson's* was published by the assignee of the defendant on the record (they having sold to a Mr. *Newberry*;) and this edition contained in

[274] it all the improvements that *Cary* the plaintiff procured from his survey, as well as others of their own.

The counsel for the plaintiff, contended, That the defendant, by embodying into his twelfth edition the improvements and matter of the plaintiff's, had been guilty of a piracy of his work, and a breach of his copy-right.

For the defendant, it was, on the contrary, contended, That *Cary's* Itinerary was, in fact, but a new edition of *Paterson's* Road Book, with improvements; or, at all events, that his publication was a piracy itself. That since the statute of *Ann*, the rights of authors to copy-rights, rested only under the statute;

and

and no common law-right existed: that the plaintiff could therefore only derive his title under the statute of *Ann;* and that under that act it was necessary that the plaintiff, who complained of the infringement of his right, should be the author; which they contended here he was not.

1801.

CARY v. LONGMAN.

To show that, in fact, *Cary* had embodied *Paterson's* book in his own, several errors which were in *Paterson's* book, were found to be copied into *Cary's:* and the same evidence was given on the part of *Cary,* to prove that his improvements had been copied into the twelfth edition of *Paterson.*

Per Lord KENYON. It appears in this case, that the plaintiff, Mr. *Cary,* has been employed by those concerned in the management of the post-office, to make an actual survey of the roads; which has been actually made at a considerable expense. The public has paid that money, if I may use the expression, to acquire that copy-right in the survey which was to be made at their expense. But it is said, That the whole of the book published by the plaintiff is not his own: that he has pirated from the defendant's book: but still it is clear, that a very considerable part is of his own collecting. It is not necessary that a plaintiff who brings an action of this sort should have the whole property in the work which he publishes. When the learned Dr. *Samuel Clarke* published an edition of *Homer,* with notes, did any one doubt of his copy-right of the notes he had published? Or of that fund of learning, Dr. *Bentley's* right to his notes on *Horace?* [275]

Mr. *Gray* gave part of his works to the public, as they were published by Mr. *Murray,* the bookseller; but some of Mr. *Gray's* posthumous works being published by Mr. *Mason,* which Mr. *Murray* added to his publication, the court ordered Mr. *Murray* to expunge the latter from his publication.

In this case lord *Walsingham,* by whose direction the survey was made, has given the copy-right of that part of the work arising from Mr. *Cary's* survey to him; and as it has been used by the defendant's assignee, in his last publication of *Paterson's Road Book,* without his consent, I think the copy-right has been infringed; but, under all the circumstances, nominal damages will perhaps satisfy the justice of the case.

The jury found a verdict for the Plaintiff, with damages 1*s.*

Erskine, Mingay, and *Holroyd* for the Plaintiff.

Gibbs, Park, and *Wigley* for the Defendant.

1801.

HOARE v. ALLEN.

In an action for crim. con. when connivance to her elopement is imputed to the husband, he may call a witness to prove the representation made by the wife to her husband of the place to which she was going previous to her elopement.

HOARE v. ALLEN.

THIS was an action for criminal conversation with the plaintiff's wife.

This cause had been tried before. It then appeared that the plaintiff, by a letter from the defendant, with whom he had lived in habits of great intimacy, was informed, that his wife had conceived for him an affection, which he had endeavoured to avoid: disavowing that any thing criminal had then taken place; but adding, that in case she did quit her husband's house, he would think himself bound in honour to afford her an asylum. It appeared in evidence, that after the receipt of this letter, her husband had permitted her to go from his house, under the pretence of going to her uncle's, accompanied only by a single servant.

The counsel for the defendant relied on this as a connivance on the part of the husband (the plaintiff) to her elopement, and which went to the ground of the action. At the former trial the jury thought so, and found a verdict for the defendant.

The case now came on to be tried on a new trial. The plaintiff's counsel relied, That the wife had left his house with a declaration of her intention to go to her uncle's: that the husband had suffered her to go, under the impression that that was the object of her journey.

The plaintiff called a Mr. *Clark*, an intimate friend of his; he proved, That he had been sent for by Mr. *Hoare;* he com-[277]municated to him the letters which the defendant had written to him. He stated, that the plaintiff was in great distress and anxiety of mind.

He was asked, If Mrs. *Hoare* did not inform her husband that she was going to her uncle's; and that her husband had given credit to it? and the plaintiff's counsel were proceeding to examine further to that effect.

This was objected to by the defendant's counsel.

Erskine contended, That though it was not evidence on the issue, to shew that her real intention was to go there; yet, that it was evidence that the husband really believed that her intention was to go where she represented.

Lord KENYON said, That he had doubts in his mind respecting the propriety of those questions, of the representations made

made by the wife to the husband, respecting her views and intentions as to a fact which afterwards took place. As, however, some of the Judges, on a motion for a new trial, thought that this was part of the *res gesta*, and ought to be admitted, he should admit it; to which the defendant's counsel, if they thought fit, might tender a bill of exceptions.

There was a verdict for the defendant.

Erskine, *Dallas*, and *Newbolt* for the Plaintiff.

The *Attorney-general* and *Garrow* for the defendant.

HARMAN *v.* TAPPENDEN and Others. [278]

A party who has been amoved from being a member of a corporation, and who has been restored by mandamus, cannot maintain an action for damages against the members of the corporation who amoved him by an act done in their corporate capacity, nor recover the costs of the mandamus.

THIS action was brought by the plaintiff, who was one of the freemen of the company of Free Fishermen and Dredgermen of the manor and hundred of *Feversham*, in *Kent*, who had been removed from his said office, and was restored to it by a mandamus from the court of King's Bench.

The plaintiff declared for special damages, by reason of his amotion: First, That he for a long time (to wit, from the 4th of *August*, 1798, to the 18th of *January*, 1800) was deprived of the advantages, profits, &c. to be derived from his privilege of laying and keeping oysters on the oyster grounds; and, 2dly, was put to great costs and charges in the several proceedings in the court of King's Bench, in procuring his restoration to the said office.

The defendants on the record were the steward, foreman, treasurer, and book-keeper of the company, and the other members who constituted a court, called *The Water Court:* by the sentence of which the plaintiff had been amoved.

The plaintiff proved, That he was entitled, as one of the corporation of free fishermen, to certain profits from the oysters, and which he had lost in consequence of his amotion. He then proved the amotion by the act of the corporation; and, lastly, The costs which he had incurred in his application to the court of King's Bench, and the proceedings on the mandamus.

Upon this case being made out, several objections were made to the action; but the only two upon which the Lord Chief Justice gave any opinion, were the following:— [279]

It was first objected, That the action was not maintainable against the defendants; inasmuch as it appeared that the acts

 upon

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HARMAN v. TAPPENDEN and Others.

upon which the action was founded, had been done by them in their corporate capacity: 2dly, That the declaration went to recover the costs of the mandamus, which could not be recovered by law, as the court of King's Bench had not given them when the rule was made absolute for a mandamus.

Lord KENYON said, That with regard to the latter point, he had no doubt: That the law had given costs only in one case of a mandamus, that was under the statute 9 *Ann*, chap. 20. which gave costs where there was a traverse; that he should therefore hold, That the plaintiff could not recover any in this action.

That with respect to the first point, he was disposed to be of opinion, that the action could not be sustained on the ground made by the defendant's counsel: That the defendants were charged for an act done in their corporate capacity. Nothing was charged or proved against the defendants that the act had proceeded from malice, or that it was done by the individuals, with a view to deprive him of the profits which he derived from his situation in the corporation, which alone could afford any colour to the action. He, however, would reserve this point, [280] and suffer the plaintiff to take a verdict, with leave for the defendants to move to set it aside, and have a nonsuit entered.

Erskine, *Garrow*, *Gibbs*, and *Wood* for the Plaintiff.

Law, *Mingay*, *Bayley*, Serjeants, and *'Epinasse* for the defendants.

1 East. Rep.

In the next term, a rule was obtained to the above effect, when the court agreed in opinion with the Lord Chief Justice, and a nonsuit was entered.

SITTINGS AFTER TERM AT GUILDHALL.

Feb. 24th.

COORE *v.* KENEDAY.

In an action of debt on a judgment of the Court of Conscience of London, the plaintiff must prove that the defendant when the judgment was obtained, was

DEBT on a judgment of the Court of Conscience for the city of *London*.

The declaration stated the acts of parliament for establishing the courts of Conscience in *London*, for the recovery of small debts. It then averred, That the plaintiff, being a person inhabiting within the city of *London*, duly warned and summoned the defendant (he then being a person inhabiting within the said city) to appear before the commissioners for the

the court of Requests: that such proceedings were had: that the commissioners made an order between the said parties, ordering that the said defendant should pay into the said court of Requests, at *Guildhall*, for the use of the plaintiff, 40*s*.* and 10*d*. costs, at four weekly payments, until the defendant and costs were satisfied, and which order then remained in full force and effect; that the plaintiff had not in any way been satisfied in that demand.

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Coore v. Keneday.

resident within its jurisdiction.

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Plea, General issue.

The plaintiff proved the entry in the book of the commissioners of the court of Request; by which it appeared, That the judgment stated in the declaration had been given.

The defendant's counsel insisted, That it should be proved that the defendant was at the time of the judgment resident within the jurisdiction of the court of Conscience in *London*.

Lord Kenyon ruled it to be necessary: and the plaintiff being unable to prove it, was non-suited.

Erskine and ——— for the Plaintiff.

Mingay and *Barrow* for the Defendant.

Allen *v*. Keeves.

A draft on a banker cannot be post dated, though not intended to be used until the day when it actually bears date.

ASSUMPSIT on a banker's check, drawn by the defendant on *Bowles* and Co., who were bankers, payable to *Janer* or bearer for 20*l*. dated the 18th *November*, 1800.

The plaintiff proved the hand-writing of the parties; that the bill was presented to the bankers for payment, who refused payment; and notice to *Keeves*,* the defendant; and there rested their case. It was proved that the check was given to the plaintiff on the 14th of *November*; but it was dated the 18th, on which day it was presented as above stated, it being stated that it was not to be used till that time.

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Gibbs objected: That the plaintiff could not recover: that it was in effect a bill of exchange, payable four days after date, it being made the 14th of *November*, and made payable the 18th, four days after, which was done to avoid the stamp. That by the 4th section of the statute, 37 *Geo*. III. ch. 90. drafts or orders payable to bearer on demand, bearing date on or before the day on which they were issued, are exempted from the stamp-duty: that this did not come within the exception of the statute, and therefore could not be given in evidence.

Lord

1801. ALLEN v. KLEVES.

Lord KENYON said, he was of opinion that, as the draft was intended only to have effect and operation from the 18th, when it was dated, he should hold it to be a draft of that date; and it appeared to him that it would produce great inconvenience in the commercial world, if he was to hold, That a check on a banker could not be post dated.

Verdict for the plaintiff to the amount, with liberty to the defendant to move to enter a non-suit.

Law and *Warren* for the Plaintiff.

Gibbs and ——— for the Defendant.

In the next term *Gibbs* moved for a new trial; when Lord [283] KENYON changed his opinion, and held the case to be not within the exception of the statute; and the plaintiff was non-suited.

THELLUSON v. COPPINGER.

Feb. 27th.

THIS was an action of malicious prosecution.

The defendant had preferred a bill of indictment against the plaintiff, upon which he had been acquitted.

The defendant was in the King's Bench Prison for debt.

He now applied to Lord KENYON sitting at *Nisi Prius*, that he might be brought up to attend the trial of this cause. The affidavit stated, That the cause was of much consequence to him; and that he believed his presence would be of material consequence at the trial.

Lord KENYON said, it could not be done. He remembered the first case in which the question had arisen respecting bringing up a person charged in execution, and which had given rise to one of the hardest actions ever tried: it was against the sheriff for an escape of the person brought up under such circumstances. The law was however now well settled, that a witness might be brought up; but it had never been extended to the case of a party to an action; nor could he do it.

Mackintosh for the Defendant.

IN

1801.

Doe ex dem. Walker v. Stephenson.

IN THE COMMON PLEAS.

SITTINGS AFTER TERM AT GUILDHALL.

Doe ex dem. Walker v. Stephenson.

Feb. 27th.

When a will is contested between the heir at law and a stranger, the execution of it must be proved by the most clear and unequivocal evidence, but, if contested at the end of some years, when the subscribing witnesses are dead, evidence may be called to their character.

EJECTMENT for premises in *Fenchurch Street.*

The lessor of the plaintiff was the heir at law of *Mary Robinson*, the testatrix.

The defendant claimed as devisee, and was not related to the testatrix: the will, it was contested on the ground of fraud in procuring it, was dated in 1785: two of the subscribing witnesses were dead: the third was called: he proved, That the testatrix lived at *Rumford* in *Essex:* that he, the witness, together with an attorney and his clerk, who were the two other witnesses, went down in the evening to *Rumford;* he stayed for some time, and between eleven and twelve o'clock at night, the witness was called in, the attorney and his clerk having been in the room some time before, when he signed the will; but he said that he never heard the testatrix speak; and that she held down her head, and looked heavy and stupid.

Lord Eldon to the defendant's counsel. Do you recollect the case of *Doe ex dem. Parr.* v. *Hicks*, at *Winchester?* Mr. Justice Buller laid it down, That when a stranger to the family claims under a devise, he would expect it to be done by most clear and explicit evidence. As to the execution of the will, I subscribe fully to that of Mr. Justice Buller's doctrine: the witness to a will is to speak to a fact, that the testatrix was at the time of executing the will of sound disposing mind, memory, and understanding. Can a witness who never heard her speak pronounce on that? And is it not evidence against her sanity that she appeared in a stupid and incapable state? I think it is.

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The counsel for the defendant relied, That as the will was contested at the end of fifteen years, when two of the subscribing witnesses were dead, that they should be at liberty to prove that the witnesses were persons of character, and not likely to procure such a will as was imputed to have been imposed on the testatrix. This was opposed by the plaintiff's counsel.

Lord

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Doe ex. dem. Walker v. Stephenson.

Lord Eldon said, he should admit it; and the evidence was admitted to that effect.

The surviving witness, who was called, stated, That before he went to *Rumford*, the mother of the defendant, who was a legatee, called to inform him he was to go there. He said, "That he must stop to get a clean shirt." She replied, "Never mind, it will be better than a shirt to you." He was proceeding to state that, after he returned, he was called in by her; and the circumstance of a conversation respecting the execution of the will.

This was objected to.

[286] Lord Eldon held, That as she had directed the witness to prepare to go to *Rumford*, for the purpose of attesting the will, any conversation with her respecting the will, was evidence.

Verdict for the Plaintiff.

Shepherd, Serjt. *Best*, Serjt. and *Jervis* for the Plaintiff.

Vaughan, Serjt. *Lens*, Serjt. and *Warren* for the Defendant.

Woodward v. Larking.

In an action of trespass against the sheriff, it is sufficient evidence to shew a bill of sale executed by him of the property in question, which recites the writ, the taking, and the sale of the property by him under it.

TRESPASS for taking a ship.

Plea of Not Guilty.

The plaintiff, to prove the taking by the defendant, who was sheriff of *Kent*, produced a bill of sale of the ship, &c. executed by the defendant to a purchaser under the *fi. fa.* It recited the issuing of the writ in a cause of *Barrow* v. *M'Connell;* that he had seized it under the writ, and so sold and transferred it. This was relied on as proof of the trespass.

For the defendant it was objected; That the only way to make the sheriff a trespasser, was by production of the writ, and proof of the taking by his officer.

Lord Eldon ruled, That as the circumstances were stated in the bill of sale, he thought that was the evidence of the trespass.

To prove property in the plaintiff, his counsel produced a copy of the ship's register from the custom-house, in which the plaintiff's name appeared as owner.

The defendant relied, That by Lord *Liverpool's* act, the mere act of production of the register was not of itself evidence of the property, without the production of the bill of sale.

Lord

Lord ELDON. The register states, That she was a *British* built ship, captured by the enemy; that the register was destroyed; that she was sold to a neutral subject; was then become the property of a *British* subject, and registered then as the sole property of *Woodward* and *Tarras*. Under these circumstances there is no bill of sale necessary; it is purchased from a foreigner, and now, for the first time, became *British* property; this, therefore, is as if the party who makes the register is the builder; and is, I think, evidence of property sufficient to call on the defendant to explain in it.

If a ship's register, taken from the custom-house, recites that she was a vessel captured by the enemy, sold to a neutral subject and by him to a British subject, it is *prima facie* evidence of property.

The defence was, That *M'Connell* was the real owner, and *Woodward* the captain: that *M'Connell* was possessed of the grand bill of sale, by a purchase under a condemnation at *Bulloigne*; and that he had paid for the repairs, &c. and appointed *Woodward* as his captain. To prove this, the defendant produced a *French* bill of sale of the ship, by which it was assigned to *M'Connell*. This was proved to be done by a notarial act, under seal, which was produced, and a copy of the original act.

This was objected to as not being evidence, it not being an examined copy, nor proved to be subscribed by the parties. It was proved, in answer, That the usage was to lodge the original instrument with the officer; and that the notary made out a copy, which he delivered out, and which was the instrument produced.

* Lord ELDON said, it was sufficient evidence, the original being always retained, and a copy only issued by a person having power by the law of *France* to authenticate the instrument.

To prove the transfer of a ship by a French bill of sale, verified by a notarial act, and a copy of the original act, is evidence.

It appeared that it had been proposed to sell a part to *Woodward*; and he stated, That 600 *l.* was paid on that account; which the defendant admitted.

Lord ELDON. An equitable title will not be sufficient to establish a property to maintain this action. I take it to be clear law, that his Majesty's subjects cannot buy ships captured; it is founded in his allegiance not to aid his enemy: it is to aid the enemy to buy captured property: notwithstanding the *French* condemnation, a person of this country cannot purchase such property, which belonged to a fellow-subject: the property therefore still remains in the original owner, from whom it was captured. [*288]

The possession of the master is the possession of the owner. If *M'Connell* originally purchased the ship, and it was proposed

To maintain trespass for taking a ship,

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WOODWARD v. LARKING.

an equitable title is not sufficient.

posed to let *Woodward* have a share, the legal interest never passed; it remained in *M'Connell;* and the sums supposed to be paid, would not give him a legal title. The policy of Lord *Liverpool's* act is to have an evidence of the real property; and to allow any other as an equitable interest defeats the policy. If the jury, therefore, believe that *Woodward* was acting as master, the action cannot be maintained.

The jury found a verdict for the defendant.

[289] *Lens*, Serjeant, *Bailey*, Serjeant, and *Littledale*, for the Plaintiff.

Cockell, Shepherd, Marshall, Best, Serjeant, and *'Espinasse* for the Defendant.

March 3d.

HURRY and SCHNEIDER *v.* ROYAL EXCHANGE ASSURANCE COMPANY.

Where a policy is on goods until safely landed, if a merchant takes the goods out of the ship into his own lighter, the policy is discharged; yet it is not so if put into public lighters registered at Waterman's Hall, in case the goods are lost from on board the lighter.

THIS was an action on a policy of insurance on the ship *Royalist*, and goods on board, from *Petersburgh* to *London*, including risque of boats, beginning the adventure on the goods from the loading on board the said goods with boats at *Petersburgh*, and the ship at *Cronstadt*, to continue upon the ship untils he should arrive in *London*, and moored twenty-four hours in safety; and upon the goods until discharged and safely landed.

The ship arrived in the river, and on the 9th of *June* the goods were taken out of the ship, and put into a lighter; it was moored alongside the wharf. While the lighter lay there, it sunk and the goods were spoiled.

It appeared further in evidence, That the plaintiffs, who were consignees of the goods employed, and paid the lighterman into whose lighter the goods had been put; but that the lighterman was a public lighterman and registered at *Waterman's Hall*, and not the private servant of the plaintiffs. No default was imputed to the lighter; and it was also proved to

[290] be the constant usage of the *Russia* merchants to land their goods by means of those public registered lighters.

The defendant's counsel, on this evidence, relied, That by the delivery of the goods out of the ship to the lighter, employed by the assured, that the policy was at an end; and cited *Sparrow* v. *Carruthers*, 2 *Stra.* 1236, as expressly in point.

The

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HURRY and SCHNEIDER v. ROYAL EXCHANGE ASSURANCE COMPANY.

The plaintiff's counsel contended, That this was a loss covered by the policy. That the delivery to a lighter of the description of that on which the goods were put on board, being a delivery according to the usage of the trade; did not discharge the underwriter until the goods were landed out of the lighter: But they chiefly relied on a case of *Rucker* v. *London Assurance Company*, which was tried at *Guildhall* before Mr. Justice BULLER (Sittings after Easter Term 1784); in which it had been ruled by that Judge, That though a delivery to a private lighter, employed by the consignees, discharged the underwriter from the time they were so taken on board, it was otherwise where the goods were delivered to a common and public lighter, entered regularly at *Waterman's Hall*. The delivery in the latter case could not be held to be a delivery to the consignee until they were landed.

Lord ELDON. This is a policy of insurance on ship and goods from *Petersburgh* to *London;* and the clause in the policy on which the question in this case arises is, "that the "policy shall continue on the ship until she is arrived in "*London*, and moored in good safety for twenty-four hours; "and upon the goods and merchandise, until there discharged [291] "and safely landed." It appears in evidence, That the goods were taken from on board the ship after her safe arrival in the *Thames*, and lost before they were landed. As the policy is on the goods "until they are safely landed," I think is incumbent on the underwriter to shew how he is discharged from this part of his express undertaking.

The case of *Sparrow* v. *Carruthers*, was decided before Mr. Justice LEE, who was a very great lawyer: he held the underwriter not to be liable until the goods were actually landed, by reason of the delivery before the landing to the consignee himself. He would not look to the custom or usage, where there was a written contract between the parties: I shall feel disposed to hold the same doctrine: but I adopt the same distinction taken by Mr. Justice BULLER, and the doctrine which he has laid down in the case cited. The ground of his determination was, That if the merchant sends his own lighters, he takes the risque on himself; but if he sends a lighterman, registered at *Waterman's Hall*, he is a person to whom public credit is given; and he is not to be considered merely as the lighterman of the consignee, but the common lighterman of both parties. This doctrine I hold, not because the case before

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before Mr. Justice Buller was the last determination on the subject, but because I think it is founded on grounds of law.

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As, therefore, the goods in question were put into possession of a public lighterman in the regular * course of discharging the cargoes of vessels in the trade on which this policy was underwritten, and the loss happened before the goods were landed, I am of opinion, that the underwriters continued liable; and that the plaintiffs are entitled to recover.

Verdict for the plaintiffs.

Shepherd, Heywood, and *Bailey,* Serjeants, and *Giles,* for the Plaintiffs.

Park, Lens, and *Best,* Serjeants, for the Defendant.

In the next term this case was moved in the court of Common Pleas, when the court agreed in opinion with the Lord Chief Justice.

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ADDENDUM ET ERRATA.

Page 22, in margin, line 20, for *obligee* read *obligor*
34, ———— line 1, dele *to maintain*
95, ———— line 6, for *if it appear*, read *it must appear*. and line 12, after *out of it*, read *or* the justification.

BENJAMIN BENSLEY,
Nelson-square.

REPORTS

OF

CASES

ARGUED AND RULED

AT

Nisi Prius,

IN

THE COURTS OF KING'S BENCH

AND

COMMON PLEAS,

FROM EASTER TERM, 41 GEORGE III. 1801,
TO HILARY TERM, 43 GEORGE III. 1803,

BOTH INCLUSIVE.

BY ISAAC ESPINASSE,

OF GRAY'S INN, ESQ. BARRISTER AT LAW.

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NAMES

OF

THE CASES REPORTED.

CASES

ARGUED AND RULED

AT

NISI PRIUS.

CHELMSFORD LENT ASSIZES, 1801.
CORAM HEATH, JUSTICE.

EARL, Clerk, *v.* LEWIS.

March 14th.

Under an issue to try the boundaries of a parish, papers handed over to the present incumbent by the representative of his predecessor, as papers belonging to the parish, found in the late incumbent's possession, are evidence.

THIS was an issue, directed by the Court of Exchequer, to try the boundaries of the two adjoining parishes of *High Ongar* and *Stamford Rivers*, in the county of *Essex*.

The plaintiff produced in evidence, a box of old papers, which were represented to be papers and documents respecting the parish and living of *High Ongar*. His counsel stated, That the plaintiff had become possessed of them as rector of the parish; they having been handed over to him from the representative of the last incumbent, Mr. *Henshaw*, as papers of that description; and were proceeding to read them in evidence.

This was objected to by the defendant's counsel, unless further proof was given of their authenticity, and of the mode by which they had come to his hands.

HEATH, Justice, said, Such evidence was necessary.

The plaintiff's counsel then called, as a witness, an attorney, who said, That on the death of Mr. *Henshaw*, the last incumbent, his papers had come into the hands of his son: that they were contained in a box: that the son had first separated the private papers belonging to himself, and had then handed over to the witness the papers then produced, as belonging to the parish; and that they were the same papers which he had so received from Mr. *Henshaw* the younger, and delivered over to the plaintiff, the present incumbent. [2]

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EARL, Clerk, v. LEWIS.

He was asked, If Mr. *Henshaw* the younger was subpœnaed, or in court, in order to be examined as to the facts to which he had been giving evidence?

This being answered in the negative, the defendant's counsel objected: That the evidence given was insufficient to establish the authenticity of those papers, so as to render them admissible, unless Mr. *Henshaw* the younger was called: That he should be called, to give an account of the way in which they came into his hands: to prove that they were papers which had been in his father's possession, as incumbent of the parish; and that they were then in the same state in which they had been found after his father's death.

HEATH, Justice, said, That he was of opinion they were admissible in the form offered, without calling Mr. *Henshaw* the younger: That the relationship in which Mr. *Henshaw* the younger stood to the last incumbent, sufficiently accounted for his possession; and he was proved to have handed them over to [3] the attorney, who had been called: and that whenever papers were proved to have been handed over to an attorney, for the purpose of producing them in evidence, it was the course always to admit them in evidence when produced by him: That as to any supposed alteration or addition that might have been made of them,—that was negatived by the witness, who said, They were in the same state in which he had received them from Mr. *Henshaw* the younger.

But a terrier or map of the parish, not signed by any of the parishioners, or parish-officers, is not admissible evidence of the boundary of the parish.

Among those papers so produced, was one describing the bounds and limits of *High Ongar* parish. It was in the form of a map, or terrier of the parish; but drawn in an unartificial manner, bearing the appearance of a rough delineation of the limits of the parish, made by the parson, or some person on his account. The metes or bounds were set out with apparently sufficient accuracy; but it was not signed by any person whatever, bearing any public character or office in the parish.

The plaintiff's counsel offered this in evidence, as an old terrier of the parish; and being found among other papers of unquestioned authenticity, respecting the parish, in the possession of the late incumbent, as entitled to be received in evidence; and cited *Buller*, N. P. 248.*

But

* In *Buller* (N. P. 248,) it is laid down, That a terrier of glebe is not evidence for the parson, unless signed by the parson, as well as the churchwardens; nor even then, if they are of his nomination; and even though signed by them, it deserves little credit, unless signed by the substantial inhabitants. Parochial surveys

1801.

EARL, Clerk,
v.
LEWIS.

But Mr. Justice HEATH rejected the evidence, without hearing the defendant's counsel.

There was a verdict for the plaintiff.

Shepherd, Serjt. *Garrow*, and *Trower* for the plaintiff.

Best, Serjt. and *Marryat* for the defendant.

surveys are regularly, in all cases, so signed; in which particular, the terrier produced was defective. But in this case the terrier produced was intended to bind the adjoining parish; which could not be; a survey made by one party, without the privity or consent of another, not being admissible evidence. *Anon.* 1 *Stra.* 95.

Vid. et Pollard v. *Scot*, *Peake*, N. P. Cases 18; where, to prove a place a public road, a copperplate map was produced; wherein the place in question was described as a public road, and purporting to have been taken by the direction of the churchwardens for the time; which was generally received in the parish as authentic. Lord KENYON rejected the evidence.

CASES

ARGUED AND RULED

AT NISI PRIUS,

IN THE

KING'S BENCH,

EASTER TERM, 41 GEORGE III. 1801.

THIRD SITTING IN TERM AT WESTMINSTER.

Doe ex Dem. Matthewson *v.* Wrightman.

It is not necessary that a notice to quit should be directed to the tenant in possession, if proved to be delivered to him at the proper time.

THIS was an action of ejectment, brought to recover the possession of certain premises in the parish of *St. Giles in the Fields.*

The ejectment was by the lessor of the plaintiff against the defendant, who was his tenant, he having given the defendant a notice to quit.

The notice was given on the 29th of *September*, and was in the following words:

[6]

"Take notice, that you quit possession of the rooms and "apartments which you now hold of me, on the 25th "day of *March*, or the 8th day of *April* next ensuing.

(Signed) "*E. Matthewson.*"

There was no direction of this notice to the defendant; but it was proved to have been served on the defendant on the 29th of *September*.

A notice to quit on one of two days is good, as on *Old* or *New Lady-day* is good, if served six months before the day on which the tenancy commenced.

Mingay, for the defendant, objected to this notice, as insufficient to entitle the plaintiff to recover: first, That as the object of it was to put an end to the tenancy, it should appear to be addressed

1801.

DOE ex dem. MATTHEWSON v. WRIGHTMAN.

addressed to the defendant as the tenant by name; whereas, this notice was addressed to nobody by name. 2dly, That as the notice to quit must, by law, end with the term for which the tenant held, the notice ought to express the time accurately when he was to do so: That here the notice was in the alternative, to quit either on the 25th of *March*, *or* on the 8th of *April*.

Lord KENYON over-ruled both objections. As to the first, his Lordship said, That the notice to quit was, in point of form, good; and that it was sufficient to shew that the defendant was the tenant to the lessor of the plaintiff, which was necessary in all cases of ejectment by a landlord against his tenant, and had been done here; and that the service was on him in that character. And, as to the second objection, it was sufficient notice to the tenant to quit if he received it six months before the end of his tenancy; the notice here was intended to meet an holding commencing either at *Old* or *New Lady-day*; and at whichsoever day it actually commenced, the notice was calculated to meet it, being given on *New Michaelmas-day*, and the demise being laid after the 8th of *April*. [7]

Mingay then contended, that it was incumbent on the lessor of the plaintiff to shew, That the defendant's tenancy did commence on one or other of those days correspondent with the notice.

If the tenant disputes the time when his tenancy commenced, that his notice to quit does not correspond with it, it is incumbent on *him* to shew the true time of the commencement of his tenancy, not on the lessor.

Lord KENYON. The lessor of the plaintiff is not bound to give any such evidence; it is sufficient for him to prove his having given six months' notice to quit, and that the ejectment has been brought after that time was expired: if he has mistaken the commencement of the defendant's tenancy, so that his notice to quit is, for that reason, wrong, the *onus* of proving the true time of the commencement of the term lies on the defendant, who thereby defeats the plaintiff of his right to recover.

The defendant being unable to give any such evidence, the plaintiff had a verdict.

Cowley for the plaintiff.

Mingay for the defendant.

SITTINGS

1801.

SITTINGS AFTER TERM.

May 12th.

WADE *v.* BEASLEY.

Where the particular of the plaintiff's demand was a promissory note only, and, on its being produced in evidence, it was improperly stamped, and could not be given in evidence, though the party could be allowed to give the consideration in evidence, he shall be precluded by his particular.

ASSUMPSIT by the plaintiff against the defendant, as executor of *Grace Wade*, deceased.

The first count of the declaration was on a *promissory note, dated in the year 1784, and given by *Grace Wade* to the plaintiff. The other counts were the common money ones.

[*8]

The defendant pleaded several pleas.

In the course of the cause, the defendant had taken out a summons for the particular of the plaintiff, and had obtained a Judge's order for the purpose.

The particular given in by the plaintiff's attorney was, "That the action was brought to recover the amount of a promissory note for 100*l.*, given by *Grace Wade* in her life-time, and payable to the plaintiff with interest."

The note, when produced, appeared to have been given on an improper stamp; but the plaintiff gave evidence of a loan of money to the amount of the note, which was the consideration of it, and there rested his case.

Garrow, for the defendant, objected: That the plaintiff was not entitled to recover on this evidence. He relied on the particular given in under the Judge's order, which stated the plaintiff's cause of action to be a note of hand, and contended that he was bound by that particular; and having failed in evidence of that, he could not resort to another cause of action, and so take the defendant by surprise.

Erskine e contra contended, That to hold the law to be so, would be to make the particular an instrument of fraud, which was meant to facilitate the proceeding in the cause: That it had been decided at *Nisi Prius* by Lord KENYON, that, where an instrument was found to have an improper stamp, when offered

[9]

in evidence, the party could go into evidence of the consideration for which the instrument was given: That, in fact, the plaintiff's cause of action was the same as stated in the particular, since the sum proved to have been lent by the plaintiff to the testatrix, was the consideration for the note mentioned in the particular of the plaintiff's demand.

Lord

Lord KENYON. Where an instrument produced in evidence has been found to be improperly stamped, I have admitted evidence of the consideration; and I should do so here, if the plaintiff had not precluded himself by his particular. The particular is to apprize the opposite party of what he is to come prepared to try; and the plaintiff, who gives it, must be bound by it, or particulars are of no use. I would assist the plaintiff if I could; but the defendant having come prepared to meet one demand, must not be called upon to meet another.

The plaintiff was nonsuited.

Erskine and *Espinasse* for the plaintiff.

Garrow for the defendant.

CARY et alt. Executors of GREATOREX v. GERRISH.

It is not evidence of itself to establish a loan of money by plaintiff to defendant, to prove that the defendant received cash for a draft or check drawn by the plaintiff on his bankers, and payable to him by name out of money of the plaintiff's, then in the bank.

ASSUMPSIT by the plaintiffs as executors for money lent to the defendant by the testator in his life-time.

Plea of *non-assumpsit*.

The testator had died in the year 1798.

*It was proved that, in his life-time, he had kept cash at the house of *Wright* and Co. who were bankers, and who had also been bankers to the defendant since the testator's death; so that the person of the defendant was well known at the banking-house to the clerks employed there.

To establish the loan of the money by the testator to the defendant, the plaintiff then produced a draft drawn by *Greatorex* the testator, in his life-time, on *Wright* and Co. his bankers, in the month of *February* 1797, payable to the defendant; and it was proved by a clerk in the banking-house, that that draft had been paid to *Gerrish* the defendant, out of money of the testator, at that time in their hands. [*10]

Per Lord KENYON. This is no evidence to establish a debt. No evidence is offered of the circumstances under which the draft was given; it might be in payment of a debt due by the testator; or the defendant might have given cash for it at the time. From the circumstance of the defendant's name being used in the body of the draft, no inference can be drawn; it is perfectly arbitrary what name is used in drawing a draft on a banker; a man uses the name which first occurs to him: if the plaintiff had shewn any money transactions between the defendant and the testator, from whence a loan could be inferred, or any application

1801. — CARY and others, Executors of GREATOREX, v. GERRISH. [*11]

application by the defendant to borrow money at the time,—that, coupled with the giving of the draft, might be evidence to go to the jury; but standing a naked transaction, as this does, *it is not evidence; and the plaintiff must be nonsuited.

Garrow and *Espinasse* for the plaintiff.

Mingay for the defendant.

Friday, May 22d.

TURNER *v.* HULME.

If the payee of a note, given for an usurious consideration, arrests the maker, and to procure his liberation, a third person joins the maker of the note in another note for the amount of the debt, the usury which affected the first note, cannot be set up as a defence to the second.

THIS was an action on a joint and several promissory note. Plea of the general issue.

The defence intended to have been relied on was, that the note was given for a usurious consideration, under the following circumstances:

A person of the name of *Banks* had applied to the plaintiff for the loan of 100*l.* He refused to advance the money, unless *Banks* would take 25*l.* part of the money, in goods. *Banks* consented to this; but, when he was to receive the money, *Turner*, the plaintiff, told him, that he would give him the whole of the 100*l.* in money, but that he, *Banks*, must give a note for 25*l.* for the goods. This *Banks* did, and also gave a note for 100*l.*, which he received; but the goods were never delivered:—the whole transaction being to cover usury.

Banks being afterwards taken into custody under an execution, on a judgment at the suit of another person in the Common Pleas, *Turner*, the plaintiff, lodged a detainer against him

[12] on the 100*l.* note. The execution and judgment were afterwards set aside; but *Banks* being detained by reason of *Turner*'s debt, *Hulme* (the defendant in the present action) called upon *Turner*, and represented to him, that he could not recover on the note, the consideration being usurious; but *Turner* refused to liberate *Banks*, unless he (*Hulme*) and another friend of *Banks*'s would join in a note to the amount of *Banks*'s debt, which they consented to do, and this was the note on which the present action was brought.

Garrow, for the defendant, contended, That the plaintiff should be nonsuited: That the consideration for the note for which the present action was brought, was the former note, which had been given on a consideration clearly usurious, and particularly as the note remained in the hands of the usurer, who had notice at the time

1801.

TURNER v. HULME.

time from *Hulme*, the defendant, that the original note was void for that account.

But Lord KENYON, on this being so opened, intimated his clear opinion to the contrary: he said, that *Banks*, when the first note had been put in suit by *Turner* against him, should have resisted and defended himself on the ground of usury; but that the consideration of that note could not be questioned in the present action, unless it could be shewn that this was a colourable shift to evade the statute against usury, devised when the money was originally lent, and the first note granted.

Gibbs and *Gaselee* for the plaintiff.

Garrow and *Burrough* for the defendant.

BAYNE *v.* STONE, Executor of STONE.

[13]

If one of two parties to a warrant of attorney has received the whole of the money, and is sued by the other for contribution, he may prove the circumstances of the one, and the payment of the money, without the production of the warrant of attorney.

ASSUMPSIT for money had and received by the testator to the use of the plaintiff, under the following circumstances:

Bayne (the plaintiff) and *Stone* (the testator) had taken a warrant of attorney to confess a judgment for 200*l.* from a person of the name of *Hampson* and his brother, for a joint debt due to *Bayne* and *Stone*.

The brother, who was the security, had paid to *Stone*, in his life-time, 127*l.* the half of which belonged to the plaintiff, and to recover which the present action was brought.

The brother was called as a witness on the part of the plaintiff, and to prove the payment of this money.

The *Attorney-General** objected: That, as this debt arose under a written security, it should be produced and regularly proved; as, otherwise, who the parties were to the warrant of attorney as well as the sum secured by it, would be proved by parole evidence, which could not be legally done.

But it was ruled by Lord KENYON, That, although the security was the foundation of the action, the immediate cause of action was money paid to the defendant's testator, which the party who had been the debtor might come to prove that he had paid to the party sued, without production of the security.

Verdict for the plaintiff.

[14]

Garrow and *Lawes* for the plaintiff.

The *Attorney-General* and *Gaselee* for the defendant.

* In the Vacation preceding this Term, Edward Law, Esq. was appointed Attorney-General, and the Hon. Spencer Percival, Solicitor-General.

1801.

EDMONSON *q. t. v.* DAVIS one, *&c.*

If an attorney is in partnership with another, and they carry on their business together, and their joint names are put on their papers in causes in their office, either of them is liable to the penalties of the act 37 *Geo.* III. for practising as an attorney without entering his certificate, though it does not appear that one of them had any profit or advantage from the suit for suing in which the action in *qui tam* is brought.

THIS was an action of debt, *qui tam*, brought to recover from the defendant several penalties given by stat. 37 *Geo.* ch. 9. sect. 30, for practising as an attorney, without having entered his certificate.

The plaintiff proved, That a suit had been instituted by the assignees of *Webb*, a bankrupt, against the present plaintiff, and shewed the several steps of suing out the writ, declaration, &c. all of which were done under the name of *Davis* and *Plaisted*, *Davis* being the present defendant; and the names of *Davis* and *Plaisted* were on all the papers and notices in the cause.

Erskine, for the defendant, cited the words of the statute, sect. 30.; by it, it was enacted, That if any solicitor or attorney should, for or in expectation of fee or reward, do any act without obtaining a certificate, and without entering the same in one of the courts, he should forfeit the sum of 50*l.*

He then contended, That, to bring the defendant within the penalty of the act, he must act with a view to profit or reward; and that the declaration *averred, for that reason, that the defendant did the business "for fee or reward." He then stated, that the facts of the case were, that *Davis*, the defendant, carried on business in partnership with *Plaisted*; that, by the terms of the partnership, *Plaisted* was to have to himself the profits of all the business which arose from his own connexions: That the action for the proceedings in which, by the defendant, the present action was founded, was commenced and prosecuted by *Plaisted* for his benefit only; and that the defendant derived no manner of advantage from it whatever.

[*15]

Which facts were proved by *Plaisted.*

Lord KENYON. This is no answer to the present action: I cannot legislate, but must take the law as it is written for me. It is a hard action; but I cannot say that the defendant had nothing to do with the original action. The cause is conducted by *Davis* and *Plaisted*; their names are to all the proceedings; the business going through their office is ascribable to both: it is the business of the office, and both would be liable to an action for negligence. It is said, that *Davis* has no interest in the suit carried on by *Webb's* assignees, but that the whole belonged to *Plaisted*. He may have no immediate benefit from this suit; but

may

1801.

EDMONSON *qui tam,* v. DAVIS one, &c.

may he not have benefit from it in another way, from some other arrangement in the partnership? But he has held himself out to the world as the attorney in the cause, and I think he must be deemed so.

There are counts in the declaration for penalties, for wrong steps taken in the cause. It seems to be an harsh construction of the statute to allow a penalty for every step taken in the cause; but I do not mean to be bound by this as an opinion that the plaintiff is not entitled to recover more than one penalty. [16]

The jury found a verdict for one penalty.

Gibbs and *Lawes* for the plaintiff.

Erskine and *Garrow* for the defendant.

WYNDHAM, Esq. *v.* LORD WYCOMBE.

If a married man neglects the society of his wife, and openly lives with other women, in the apparent practice of adultery, he can bring no action against another for criminal conversation with his wife.

THIS was an action for criminal conversation with the plaintiff's wife.

The adultery was proved to have taken place in the year 1795, at which time the plaintiff was the British envoy at *Florence.*

The defence relied on for the defendant was the open and notorious infidelity of the plaintiff to his wife, and a total neglect of her society: That his gallantries with other women were open, public, and undisguised: That he had attached himself to a lady at *Florence* of the name of Madame *Bartioli*; appeared with her constantly in public, and at the opera when his wife was absent: That Madame *Bartioli* was esteemed a woman of loose principles, and that little doubt was entertained of an intrigue subsisting between them; and that he took no pains to disguise his attachment to her; shewing her those attentions in the presence of Mrs. *Wyndham,* his wife. [17]

This was opened by *Garrow,* of counsel for the defendant; and, in the course of his address to the jury, he stated, That if the facts stated were substantiated by evidence, he relied on the law as delivered by Lord KENYON in the case of *Sturt* v. *the Marquis of Blandford,* which had been tried at the sittings after the preceding term, as furnishing a complete answer to this action. In that case his Lordship had ruled, " That, though in an action for criminal conversation with the plaintiff's wife, the gallantries of the husband before marriage could not be brought into question, or given in evidence, because the wife had married a rake with notice, and might have done so with a view to reclaim him;

1801.

Wyndham, Esq. v. Lord Wycombe.

him; if, however, after marriage, the husband openly violated all those rules of conduct which decency required, and affection exacted of him; if he openly practised his gallantries without regard to his wife, and violated the marriage-bed, so as to create disgust or unhappiness in his wife; that such a husband could not come into a court of justice for damages, or complain of the loss of the society of a wife which he never courted or enjoyed; and that, of course, such conduct on the part of the husband went to the ground of the action.

Lord Kenyon assented to the statement, and said, he had so ruled in the case of *Sturt v. Marquis of Blandford;* and that such was his opinion in point of law.

In the course of the evidence, it appeared that the gallantries [18] of the plaintiff had been while he resided in *Florence*, open, undisguised, and notorious: That he had publicly appeared with Madame *Bartioli* as a mistress: That he had also taken a house for a Madame *Mari*, which he had furnished, and had notoriously kept her as a mistress.

The *Attorney-General*, who led for the plaintiff, on this evidence being given, consented to be nonsuited.

The *Attorney-General*, *Erskine*, and *Tripp*, for the plaintiff.
Garrow, *Gibbs*, and *Jekyll*, for the defendant.

Compton v. Chandless one, &c.

If the plaintiff in an action to recover the consideration of an annuity, states that a warrant of attorney, part of the securities, was set aside, it must be proved; it is not sufficient to produce the rule of court by which it is set aside.

THIS was an action on the case, against the defendant, charging him, as attorney for the plaintiff, with negligence.

The negligence imputed to him by the declaration was, That an annuity having been granted to the plaintiff, he had been employed as his attorney, to prepare the securities, and to enrol the memorial. It then charged, That he had so negligently and improperly caused the memorial to be enrolled, that, by reason of a defect in such memorial, the securities had been set aside by rule of court, and the plaintiff had lost the benefit of his annuity and the money paid for the same.

The defendant pleaded, 1st, not guilty; and, secondly, The Statute of Limitations, that the cause of action did not accrue within six years.

[19] The plaintiff had assigned the annuity to one *Kirkby*. The annuity had been set aside; and *Kirkby* had brought an action against the plaintiff for the consideration money, which he had recovered

recovered back. This had taken place within six years. The annuity had been granted the 20th of *November* 1787.

The plaintiff's counsel produced from the office the original memorial, as prepared by the defendant. This it was proved was copied on a roll, but it was not proved to be examined. They also produced an examined copy from the office, of the original memorial.

Gibbs, for the defendant, objected: That this did not prove the averment in the declaration, which stated, "that the defendant had caused a memorial to be enrolled:" if the parchment produced had issued from the office, or was an examined copy, it would be good; but this was neither.

Per Lord KENYON. I think this evidence sufficient; at least I shall not stop the cause for it. In the case of conveyances by bargain and sale enrolled, I never knew the enrollment proved; the deed is produced, with the enrollment indorsed, and that has been held to be sufficient: this is to the same effect.

The declaration stated, among the other securities which had been set aside, a warrant of attorney from the grantor to the plaintiff, who was the grantee of the annuity.

The plaintiff proved an office-copy of the judgment, signed under the warrant of attorney, and the rule of court by which the deed bond and warrant of attorney were set aside; but the warrant [20] of attorney was not produced.

It was objected by *Gibbs*, that it was necessary to be produced, as being set out in the declaration.

It was answered by *Garrow*, for the plaintiff, That as against the plaintiff this evidence was sufficient, he being the attorney to whom the warrant of attorney was delivered, for the purpose of entering up the judgment, and the rule stating that it had been set aside, was sufficient evidence of its existence.

Lord KENYON intimating that he thought it necessary, *Garrow* said, The defendant had notice to produce it, which Lord KENYON said would do.

The notice was produced and read, and it was to produce bills of costs and copies of securities.

Lord KENYON said, he was clearly of opinion, that the warrant of attorney ought to have been produced; it was a material averment in the declaration, which it was necessary to prove, and that neither the rule nor notice supplied it; the plaintiff should therefore be called. As to the plea of the Statute of Limitations, his Lordship said, he had not made up his mind on it, but the inclination of his opinion

1801.

COMPTON v. CHANDLESS one, &c.

opinion was, that the plea was insufficient: That in the case of an action of trover, if goods are left in the hands of another, the Statute of Limitations does not begin to run from the time of delivery, but from that of the demand and refusal.

Garrow and *Comyn* for the plaintiff.

Gibbs and *Wigley* for the defendant.

[21]

SITTINGS AFTER TERM AT GUILDHALL.

June 1st.

JOHNSON v. GILSON.

Under a notice to produce a letter which is produced, and mentions that it covers other papers, those papers are not thereby made evidence, unless they are referred to in the letter.

ASSUMPSIT on a policy of insurance on the ship *Superb*, on a voyage from *Lisbon* to *Charlestown*.

The defendant had given the plaintiff notice to produce a letter. It was called for at the trial, and produced and read. It mentioned, among other things, that it covered several papers enclosed in it.

These papers were produced, together with the letter; and the plaintiff's counsel contended, that they should also be read in evidence, as part of that called upon by the notice to be produced; the notice to produce the letter being a notice to produce whatever it contained relative to the business in question, as well as the contents of the letter itself; which was of course made evidence by the notice.

Per Lord KENYON. If the letter refers to the papers which it covers; that is, refers to them in such a way, that it is necessary to incorporate the papers enclosed with the body of the letter, in order to make it intelligible, or the sense complete, in that case, the papers enclosed would be, by the notice, made evidence and admissible; and the party who produced the letter and the enclosure, would have a right to have the whole read; but independent
[22] papers, not referred to by the letter, but which it only covers,—such papers are not thereby made evidence.

Verdict for the defendant.

Erskine, *Gibbs*, and *Giles*, for the plaintiff.

The *Attorney-General* and *Garrow* for the defendant.

1801.

WHITE v. BARING, et alt.

Same day.

The captain of a ship, who has entered into engagements on account of the ship, thereby acquires a lien on the goods and on the freight to the extent of his engagements.

THIS was an action of assumpsit, brought on a bill of lading, by the capta in against the defendants, as consignees of the cargo, to recover the amount of the freight and primage.

The defendants pleaded the general issue; and set up the following defence :—

The ship belonged to *Maillard* and Co. She had been chartered on a voyage from *London* to *Surinam*, and back. The defendants were the consignees for the voyage; and as such, liable for the freight.

The voyage was performed; and, after the ship's arrival, the defendants paid over to the assignees of *Maillard* and Co. the amount of the freight, they having become bankrupts: but this payment was made by the defendants after they had received a written notice from the captain (the plaintiff) not to do so, as he was liable for the payment of several debts, on account of the ship; and, therefore, claimed to be paid the freight for the purpose of discharging those debts, as well as the primage; which [23] was a personal demand in his character of captain.

The defendants' counsel contended, That the claim made by the captain was not a legal one: That the owners were the persons who were legally intitled to the freight; and that, therefore, the payment having been made to them, it was a complete discharge to the defendants.

The plaintiff's counsel, on the other hand, relied, That the contract in question having been entered into between him and the consignees, and he having entered into different contracts on account of the ship, on the faith of the freight being paid to him, and made himself liable to the payment of debts on account of it, that he had a right to receive the freight to cover such engagements; and cited *Garnham* v. *Bennett*, 2 *Stra.* 816, and *Rich* v. *Coe*, *Cowp.* 636.

Per Lord KENYON. The creditor of a ship has a threefold security: the ship itself, the owners, and the captain. The captain is liable by reason of the contracts into which he enters on the ship's account; but having contracted and made himself liable for articles furnished to the ship, he thereby acquires a lien on the goods, as well as freight: and I am of opinion, That his lien

 is

1801. WHITE v. BARING.

is co-extensive with his liability to the ship's creditors. If, therefore, the plaintiff can shew that goods were furnished to the ship by his direction, and on his credit and account, I shall hold his lien on the freight to extend so far; and, of course, that the payment to that extent, made by the defendants, has been made in their own wrong.

[24] The plaintiff proceeded to give this evidence; and called a witness of the name of *White*, who had furnished goods on the ship's account, to prove the furnishing of the goods; and that he had given credit to the plaintiff, and not to the owners, for the amount of them.

Gibbs, for the defendant, objected: That he was an inadmissible witness, on the ground that he was interested in establishing the demand against the captain, inasmuch as the object of the present action was to give the plaintiff a right to recover against the present defendants, by reason of the plaintiff's liability to the witness; if he, by his testimony, did enable the plaintiff to obtain a verdict, he thereby created a fund for the payment of his own debt

Lord KENYON over-ruled the objection. He said, It was the case of every creditor who was called as a witness for his debtor. The debtor was, by the effect of a verdict in his favour, better able to pay his debts; but it was not an interest that went to the competence of a witness, whatever it might do to his credit.

Verdict for the plaintiff.

The *Attorney-General* and *Harrison* for the plaintiff.

Gibbs, *Stephens*, and *Lawes* for the defendant.

A rule for a new trial was moved for and obtained in this case, on the ground of a mistake in the Judge in point of law; but the cause was afterwards settled, so that no determination of the Court of King's Bench was had on it.

[25]

SMITH v. SURRIDGE.

Though unnecessary delay may avoid a policy, that shall not be deemed so which is employed in necessary repairs, if the policy is "at and from the place."

THIS was an action on a policy of insurance on the ship *Resolution*, at and from *Pillaw* to *London*; effected the 15th of *May*, 1800. The ship had arrived at *Pillaw* on the 13th of *May*. It became necessary, while there, to repair her: and she was there accordingly thoroughly repaired, and ready to take in the cargo on the 27th of *June*. Part was taken in on the 1st of *July*. At that time the water was uncommonly low; so much so, that the vessel could not get over the bar. It so continued till the

the 10th of *August*, when she attempted to sail; but was unable to do so; and did not sail till *November*, when the loss happened. 1801.

SMITH v. SURRIDGE.

Erskine, for the defendant, made two points:—1st, That there was voluntary delay on the part of the plaintiff, and such a variation in the risque insured, by which the underwriters were discharged, as they had insured a summer, and not a winter voyage: That the insurance was effected in *May*; of course the underwriters had reason to suppose she would then, or soon after, sail; whereas she did not sail till *November*: That though the plaintiff endeavoured to account for it, from the want of water, in fact, it arose from the state of repair in which the ship was: That she was in such a state of repair, as made it necessary to occupy a considerable length of time in repairing her; having done so, that when she attempted to sail, she was unable; whereas had [26] she not wanted the repair, she might have sailed immediately; so that that was such delay as discharged the policy.

He then objected: That there was not sufficient property in the plaintiff to sustain the action. He stated as to that, the facts to be, That the vessel was a *Dutch* ship, taken by the *French*, and carried into *Bergen* in *Norway*; where she was condemned by a *French* Court sitting there. He produced a bill of sale, dated the 10th of *April*, 1799, to a *Danish* subject, under the sentence of the Court of Admiralty at *Bergen*. This he contended to be contrary to law; and there was another bill of sale from the purchaser to the plaintiff *Smith*.

Lord KENYON over-ruled both objections. His Lordship said, That, if there was any voluntary delay on the part of the plaintiff, there was no doubt it would avoid the policy; but he saw none here. The policy was *at* and from *Pillaw*. Such a policy, *at* and from a place, attached on the ship while she was undergoing repairs, it was not necessary that she should be sea-worthy at the time of the insurance. The underwriter took into his consideration the time she might be necessarily detained there. She did undergo repairs, which were necessary; and when she was ready to sail, there was an unusual want of water, which prevented it. It was from this cause the delay proceeded; it was not a voluntary delay, nor such as amounted to a discharge of the policy.

As to the second point,—The sentence of a *French* Court, in a country out of the jurisdiction of *France*, had been wisely held [27] not to change the property: but when it had been acquiesced in in that country, it might make a difference; and from the time of

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1801.

SMITH v. SURRIDGE.

the sale under such decree, the property was regularly brought down to the plaintiff.

Verdict for the plaintiff.

Gibbs and *Giles* for the plaintiff.

Erskine, *Scarlett*, and *Gaselce* for the defendant.

SITTINGS AFTER TERM IN THE COMMON PLEAS.

June 2d.

CARROL v. BLENCOW, Esq.

A married woman, whose husband has been transported for seven years, may maintain an action as a feme sole, on the ground of the husband having abjured the realm, even though the term of his transportation has expired.

THIS was an action of assumpsit, for goods sold and delivered.

The defence relied upon was,—That the plaintiff was a married woman.

The plaintiff's counsel answered this case so attempted to be set up, by producing the record of the husband's conviction for felony, in the month of *March*, 1794, and of a sentence of transportation for seven years: from whence they contended, That he had abjured the realm; and so the action was maintainable by the wife as a *feme sole*.

It was answered by the defendant's counsel, That by the plaintiff's own shewing, no right of action then subsisted in the plaintiff; for that the sentence being for seven years, from *March*
[28]
1794, that time was now expired; so that the husband was now a *liber* and *legalis homo*, and competent to sue.

Lord ALVANLEY said, That by the record of the conviction and sentence produced, there was conclusive evidence to support the right of action in the plaintiff, as a *feme sole*, it appearing thereby that the husband had abjured the realm; and though the term of his transportation had expired, if in fact he had not returned, the right of action remained; but that if the defendant meant to rely that he had so returned, by which the plaintiff's right of action, in her sole capacity, would be at an end, the proof of that lay on the defendant.

No evidence was offered to that effect, and the plaintiff had a verdict.

Cockell, Serjt. and *Manley* for the plaintiff.

Shepherd, Serjt. and *Reader* for the defendant.

BENNET

1801.

June 4th.

Bennet v. Francis.

Though goods have been tortiously taken, if the owner chuses to consider the taking as a sale, and delivers a bill of parcels for the value, which the person having the goods receives, and on an action brought, as for goods sold and delivered, pays money into court, he cannot set up the tortious taking as a defence to the action.

ASSUMPSIT for goods sold and delivered, money had and received, with the other common counts.

The defendant pleaded, 1st, *non assumpsit;* and 2dly, A tender of the sum of 4*l.* 3*s.*; which was paid into court.

The plaintiff admitted the tender, and went for further damages.

The circumstances of the case were these:- The plaintiff and the defendant were hide-salesmen in *Leadenhall Market*, and occupied adjoining * stalls, where their skins were exposed. On the 23d of *December*, the plaintiff received, from two butchers, two different parcels of skins; three in number each. One parcel was marked with a W; the skins in the other parcel had each a slit on the ear. They were thrown into two heaps on his stand.

[* 29]

The plaintiff's servant having occasion to leave the stand for a short time, on his return he missed the skins; and, on searching for them, he found two with the mark of the W among some skins of the defendant, which he claimed and identified; and they were restored to the plaintiff. The third with that mark, the defendant admitted that he had sold for 1*l.* 12*s.*

With respect to the two others, the plaintiff's servant proved, That two skins, with a slit in the ear of each, were found among the skins of the defendant; and corresponding in the colour and marks with those lost by the plaintiff These were also demanded of the defendant; but he refused to deliver them up, saying, That they had been sent to him by a customer of the name of *Paul;* and that they did not belong to the plaintiff.

The plaintiff then sent him a bill of parcels, charging him for the price of the skins, and then brought the present action for goods sold and delivered; to which the defendant pleaded as above.

The facts stated were proved, when the counsel for the defendant contended, That the plaintiff had mistaken his form of action, and that the present action could not be sustained, there being no pretence for setting up any contract for the sale of the skins, as between the plaintiff and the defendant: That the evidence, if it proved any thing, established a tortious conversion by the defendant; and that of course the action should have trover. [30]

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1801.

BENNET v. FRANCIS

It was answered by the plaintiff's counsel, That whatever might have been the original ground of action, arising out of the mode by which the defendant had become possessed of the plaintiff's skins, it now could avail him nothing, he having pleaded a tender, and paid money into court; by which he had admitted a contract, and was precluded from considering the transaction in any other light; and cited *Gutteridge* v. *Smith*, 2 *Hen. Black.*

CHAMBRE, Justice. Whenever a party has lost his goods, and they are proved to have come to the possession of another, he has by law a right to consider the transaction as a tort, and to bring an action of trover for them; or he may affirm the rightfulness of the possession, and sue in contract for the value. This is the common case in bankruptcies. In the present instance, though there does not appear to have been any contract for the sale of the goods in question; but, on the contrary; the defendant seems to have got possession of the goods by mistake, or perhaps tortiously; so that trover would have been the action most proper to have been brought, I am of opinion, That the defendant cannot now set up any such objection; but that, on the contrary, he has admitted that there was a contract of sale, by receiving a bill of parcels, and paying money into court.

[31] The defendant desired the point to be reserved.

The plaintiff had a verdict.

Best, Serjt. and *Espinasse* for the plaintiff.

Vaughan, Serjt. and *Reader* for the defendant.

In the next term the point was moved, and a rule obtained; but the Court of Common Pleas concurred in opinion with the learned Judge.

CASES

[32]

ARGUED AND RULED

IN TRINITY TERM, 41 GEORGE III. 1801.

IN THE

KING'S BENCH.

FIRST SITTING IN TERM AT WESTMINSTER

DICKINSON *v.* PRENTICE.

ASSUMPSIT on a bill of exchange, drawn by one *Frederick Smith* on the defendant, and accepted by him.

In an action on a bill of exchange against the acceptor, where the defence is forgery, which is imputed to him by the drawer, the drawer may be, notwithstanding a good witness to prove the defendant's hand-writing to the acceptance.

The defence intended to be set up was, That the acceptance was a forgery.

To prove the defendant's hand-writing, the plaintiff's counsel called *Smith*, the drawer of the bill.

Garrow, for the defendant, objected to his competency, on the ground that the bill being drawn by the witness, and which was not denied by him, the forging of the defendant's acceptance was only imputable to him; and that, as in case the jury found the bill to be a forgery, he might be committed and tried for a capital offence: the influence that that might have on his testimony, ought to disqualify him.

[33]

Per Lord KENYON. If any interest in the event of this cause could be brought home to the witness, or the verdict in it could be given in evidence in his favour in another cause, that might disqualify him; but I see here no interest sufficient to impeach his competency. The objection to the competency of a witness,

arises

1801.

DICKINSON v. PRENTICE.

arises from his having a civil interest, not from any bias he may have from an apprehension that the testimony which he is about to give, may have an effect in a criminal proceeding. That is matter of observation, as to his credit; but it is no objection to his admissibility.

The witness was admitted; and the plaintiff had a verdict.

Erskine and *Const* for the plaintiff.

Garrow for the defendant.

PENTON v. ROBART.

Though a building may be raised on a brick foundation, and have a brick chimney, if the erection on such foundation is of wood, and the building be used for the purpose of trade or manufacture, the tenant may remove it at the end of his term.

[*34]

THIS was an action of trespass, for breaking and entering the plaintiff's yard; and taking and carrying away a building therein erected, and the several materials belonging to it.

The question in the case was, Whether the building taken away by the defendant, was of that description which a tenant was authorized to remove at the expiration of his term, and on his quitting the other premises demised by the plaintiff?

The building in question, consisted of a brick basement, of about two feet high, sunk into the *ground. A wooden plate was laid on the brick, and the quarters were morticed into it. It was twelve feet high in front, and seven in breadth. There was a large brick chimney, with iron plates round it, and staunchions. It was for carrying on a varnish manufactory. There were boilers used for the carrying it on; which were also set in brick-work.

The defendant's counsel relied on the latitude of modern decisions upon this head; as allowing all erections for the benefit of trade, to be removed by the tenant on the expiration of his term.

For the plaintiff, it was insisted, That this was a permanent erection, sunk into the ground, with a brick chimney, and raised on a brick foundation; that this, therefore, annexed them to the freehold, and defeated the right which the tenant might otherwise have had to remove erections merely made of timber, for the convenience of trade.

Lord KENYON. The mere erection of the chimney will not prevent the right of taking away the rest of the building which surrounded it, where the trade was carried on. In the case of a noble family of this country, *Dudley* v. *Dudley*, a steam-engine, to which a chimney necessarily belonged, was held to be removeable.

able. Modern determinations have, for the benefit of trade, allowed many things to be removed, which the rigor of former determinations, considering as fixed to the freehold, prohibited. The case of cider-mills is familiar to us all. The construction ought to be favourable to the tenant; and my opinion is, That he was warranted in removing the building in question; but I will reserve the point. [35]

1801. PENTON v. ROBART.

In this case, the premises had been originally demised to one *Cotterell*; who had underlet them to the defendant. The term expired at *Michaelmas*; and the defendant had entered after that time, and removed the building.

Mingay, for the plaintiff. At all events, the defendant is a trespasser for this entry. The term was expired, and he had no right afterwards to come on the premises, which were then in possession of the plaintiff.

Per Lord KENYON. Where the tenant has by law a right to carry away any erections, or other things, on the premises which he has quitted, the inclination of my mind is, That he has a right to come on the premises, for the purpose of taking them away; but as to this point, the defendant has let judgment go by default.

Mingay and *Reader* for the plaintiff.

Garrow for the defendant.

In the next term, the case came before the Court of King's Bench, when it was decided, That the building in question might lawfully be removed by the tenant. Vide 2 *East's Rep.* 88.

SITTINGS AFTER TERM AT WESTMINSTER. [36]

DAVIES *v.* SMITH.

Where to a demand of a debt above six years' standing, the party on being applied to for payment says, "I think I am bound in honour to pay the money, and shall do it when I am able," is a conditional promise only, and not an absolute one to take it out of the statute of limitations.

ASSUMPSIT by the plaintiff, as holder of a bill of exchange, drawn by the Hon. *C. Cary*, and accepted by the defendant.

The defendant pleaded, 1st, *Non assumpsit*: 2d, *Non-assumpsit infra sex annos*.

To prove a new promise within six years, the plaintiff called

1801.

DAVIES v. SMITH.

a witness, whose evidence was, That the defendant, on being applied to for payment of the note, said, "I think I am bound in honour to pay *Davies*; and I shall pay him when I am able:" and this was relied upon as sufficient evidence to sustain it.

For the defendant, it was contended, That it was a conditional promise only, in case of his ability to pay; and that that should be shewn in evidence.

Lord KENYON ruled, That it was a conditional promise only; and that the plaintiff was bound to shew that the defendant was then of sufficient ability to pay; adding, That it had been so ruled before by Lord Chief Justice EYRE.

Where a defendant has made a promise to pay a debt when he is able, it must be shewn that he was able at the time when the action was brought.

The plaintiff's counsel then stated, That the evidence which they had to offer, was, That by the death of his grandfather, the defendant had become possessed of 8000*l.* under his will.

*Per Lord KENYON. That is not sufficient. The plaintiff should shew that the defendant was of sufficient ability to pay when he was sued. I remember a case in which Serjt. *Nares* was of counsel, which turned upon this point: he contended, That every man was able to pay his debts, for *solvat per corpus, qui non potest crumenâ*; but that distinction is too fine.

[*37]

They then called a witness to prove the interest which the defendant took under his grandfather's will. He did so; but, on his cross-examination, he said, That whatever benefit he might have derived under the will, he was then in debt infinitely beyond it: and was, in fact, in consequence of his difficulties, forced to live out of the kingdom.

Lord KENYON, on this evidence, nonsuited the plaintiff.

Erskine and *Espinasse* for the plaintiff.

Garrow for the defendant.

July 1st.

GARRELLS v. ALEXANDER.

In an action on a foreign bill of exchange, to prove the hand-writing of the defendant, it is evidence to go to the jury, that a person who saw him write once, thinks the hand-writing alike, though he has no belief on the subject. *Aliter*, if he had never seen the party write: mere comparison of hands would not be admissible evidence.

ASSUMPSIT on a foreign bill of exchange.

To prove the hand-writing of the defendant, the plaintiff called the clerk of the defendant's attorney.

His evidence was, That he had seen the defendant sign the bail-bond in the cause; but had never seen him write on any other occasion. Being asked, Whether he believed the acceptance to be *the hand-writing of the defendant, he said, He could

[*38]

form

1801.

GARRELLS v. ALEXANDER

form no belief on the subject; it was like the hand-writing in which the bail-bond was subscribed; and he was about to compare them together.

Lord KENYON told him, He must form a judgment without such comparison of hands.

He then looked again on the bill, and said, It was like the hand-writing in which the defendant had subscribed the bail-bond; but that he could not speak to any belief further than he had already done.

Garrow, for the defendant, objected: That there was not sufficient evidence; and that it would be of dangerous consequences to allow such loose evidence of a hand-writing to charge a party with a debt.

Lord KENYON. This is a case of a foreign bill of exchange; and, I think, there is evidence to go to the jury: and that I am bound to leave it to them. To be sure, mere comparison of hands is not admissible evidence of itself: that was *Algernon Sidney's* case; but there the witness had never seen him write; and the only evidence in the case was, mere comparison of hands: but in the present case, the witness has seen the defendant write and he speaks to the likeness which the hand-writing, in which the bill is accepted, bears to that which he has seen the defendant actually write. I therefore think that it is evidence to go the jury.

The jury found for the plaintiff.

Mingay and *Parnther* for the plaintiff.

Garrow for the defendant.

[39]

June 26th.

EDWARDS v. CROCK.

Where the husband and wife necessarily, from their situations in life, live separate, and the wife commits adultery, letters written by her during their separation, but before any suspicion of misconduct in the wife, is admissible evidence to shew that the husband and wife lived in a state of connubial affection previous to the adultery; but the time when the letters were written must be shewn.

THIS was an action on the case, for criminal conversation with the plaintiff's wife,

The plaintiff in the action, was butler to Lord *Harewood*; and lived at the time of the adultery imputed to the defendant, at his master's seat in *Yorkshire*.

The defendant was steward to Mr. *Coke*, of *Holkham*, in *Norfolk*; where the plaintiff's wife lived in the capacity of housekeeper.

To prove that, previous to the wife's adulterous intercourse with

1801.

EDWARDS v. CROCK.

with the defendant, she and the plaintiff had entertained sentiments of great affection for each other; *Erskine*, for the plaintiff stated, That from the situation of the parties, both being in the station of servants, and necessarily living apart, he was deprived of any ability of proving by the usual evidence in those cases:— That the husband and wife lived together, previous to the adultery, in habits of mutual affection and happiness; but that as their living apart was not the effect of choice, but of necessity, and entitled the husband equally to the protection of the law, he proposed to give in evidence, letters written by her to him, while in different services, expressive of affection and attachment to him. This he relied upon was evidence; particularly as Lord KENYON had before ruled, That expressions of affection and regard used by the husband and wife in each other's presence, was admissible.

[40] The Attorney-General, for the defendant, opposed its admissibility, on the ground that it might possibly be turned to a very dangerous purpose, by the husband and wife's entering into a collusive correspondence, full of sentiments of assumed affection, for the purpose of increasing the damages in an action of adultery.

Lord KENYON said, He thought the evidence was admissible; but that it should be confined to letters written before there was any suspicion of adultery committed by the wife: That as the only objection seemed to be possible collusion, that was obviated by the exclusion of all evidence of that description, subsequent to any suspicion attaching on the wife: That he should therefore, before he admitted the letters to be read, expect to have it accurately ascertained, when and under what circumstances they were written, in order to shew, that at that time there was no suspicion of misconduct in the wife.

The plaintiff was unprepared with evidence to that effect, or when the letters were written, and Lord KENYON refused to receive them in evidence.

Verdict for the plaintiff.

Erskine and *Wigley* for the plaintiff.

The *Attorney-General* and *Holroyd* for the defendant.

SITTINGS

1801.

SITTINGS AFTER TERM AT GUILDHALL.

HARRIS *v.* MORRIS.

July 7th.

If a husband has turned his wife out of doors, by a general advertisement in the newspapers, or by particular notice to individuals not to trust her, he cannot exempt himself from a demand for necessaries furnished to her while so living apart from him. Though a wife has been guilty of adultery, but the husband takes her again into his house, if he afterwards turns her out, he is liable for necessaries furnished to her.

THIS was an action of assumpsit, brought to recover a sum of money, claimed by the plaintiff for meat, drink, and other necessaries furnished to the defendant's wife.

The plaintiff's counsel stated, That the wife having been turned out of doors by the defendant, had taken shelter with the plaintiff, where she was entertained and furnished with necessaries.

The defendant denied that she was turned out; but relied on her having been seen in improper familiarities with a person living near her house, though he could produce no proof of actual adultery: That she had formerly eloped for adultery, and been in the *Magdalen Asylum*; but that he had afterwards taken her back: That he had advertised her in the newspapers, and cautioned persons from trusting her on his credit: Lastly, that he was a journeyman tradesman, and incapable of making her any allowance.

In answer to the last matter relied on by the defendant, it was proved, that the defendant had said, that his wife had ten guineas a year, independent of him, and that he could allow her 5*s. per* week addition. This was pressed by the plaintiff's counsel as having been ruled by Lord MANSFIELD, to be evidence of the husband's ability to that extent.

[*42]

*Lord KENYON. The defendant has urged several matters in bar of this action, but none appear to me to amount to a legal defence. With respect to her having been formerly guilty of adultery, and having been in the *Magdalen Asylum*, though an adulterous elopement will prevent the husband from being liable for articles furnished to the wife during the term of her elopement, that is no answer now. The husband has taken her back, and she was from that time entitled to dower: she was *sponte retracta*, and of course entitled to maintenance during coverture, if her husband turned her out of doors.

The next defence is, that he advertised her in the newspaper, and forbid persons to trust her: that cannot avail him; for if he put her out of doors, though he advertised her, and cautioned all persons not to trust her; or if he even gave particular notice to

individuals

1801.

HARRIS v. MORRIS.

individuals not to give her credit, still he would be liable for necessaries furnished to her; for the law has said, that where a man turns his wife out of doors, he sends with her credit for her reasonable expenses.

With respect to the offer of 5*s*. *per* week, I agree with what my Lord MANSFIELD has said, That it is evidence to go to the jury of the husband's ability; but the jury ought to consider the terms upon which it was offered.

A juror was afterwards withdrawn by consent.

Erskine and *Wainwright* for the plaintiff.

Garrow and *Manley* for the defendant.

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[43]

BATESON v. HARTSINK et alt.

July 7th.

The solicitor under a commission of bankruptcy, is not bound to produce the proceedings under it, though called upon by subpœna *duces tecum*. When the bankrupt pleads his bankruptcy and relies upon his certificate, which the plaintiff contends is void, under stat. 5 *Geo*. II. ch. 30, the plaintiff can only impeach the certificate, but not the commission. But if the petitioner's creditor signed the certificate, and the debt is bad, it may be impeached, though it may affect the commission itself.

ASSUMPSIT on a bill of exchange accepted by the defendants, who had been bankers.

The defendant *Hartsink*, pleaded bankruptcy; and relied on his certificate, which he had obtained.

The plaintiff proposed to answer this plea, by shewing, That the certificate had been fraudulently and illegally obtained, and was of course void:—1st, On the ground of concealment of property by the bankrupt, on his last examination; and, 2dly, On the ground, that the bankrupt had gambled in the stocks, and thereby lost a very large sum of money, sufficient to avoid his certificate, under stat. 5 *Geo*. II. ch. 30.

The solicitor under the commission awarded against the defendant, was subpœnaed, with a *duces tecum* of the proceedings under the commission.

He was in court, and had the proceedings with him.

The defendant's counsel objected to the production of them.

It was pressed by the plaintiff's counsel, That they should be produced; as otherwise it would be impossible to punish any bankrupt who had been guilty of a concealment of his property on his last examination, if the proceedings containing his last examination were withheld: That as the object of the plaintiff, in calling for the proceedings which contained an account of all the property which the bankrupt gave up, was to shew, that at that time * the bankrupt was possessed of other property which he had not there mentioned, or included in any schedule of his property there given in by him; and as the account there given in by him, made part of the proceedings, and was the only legal evidence of what property the bankrupt had there given up, the assignees, by collusion with a fraudulent bankrupt, might screen

[*44]

him

all times: That the statute 5 *Geo.* II. by making a concealment of property to the amount of 10*l.* an act sufficient to avoid the certificate, would be nugatory, unless a creditor had a right to call for the proceedings when the case required it.

1801.

BATESON *v.* HARTSINK et alt.

Lord KENYON said, He was clearly of opinion that the solicitor under the commission, was not only not bound to produce the proceedings, but that it would be criminal in him to do it: they were not his papers, but those of his client's, the assignees of the bankrupt's estate. If the plaintiff wanted them on the trial of a cause, he should apply to the Lord Chancellor to have them enrolled, and then use a copy as evidence.

Erskine, for the plaintiff, then proceeded to call a witness to impeach the debt of *Tinson*, who was the petitioning creditor.

This was opposed by the defendant's counsel, who insisted, That by the words of the statute they were precluded from going into evidence to impeach the commission, and were confined to objections to the certificate only.

Erskine said, That *Tinson* had signed the certificate, and was not a creditor: That he could prove that the house of the bankrupt gave *Tinson* the bill without any consideration, for the purpose of making him a petitioning creditor; and that it was, in fact, impeaching the certificate, by shewing that the commission had no legal petitioning creditor's debt to support it. [45]

Lord KENYON, after referring to the statute, said, I think the party is precluded from going into any evidence to impeach the commission; it must be confined to the certificate only: but, if the petitioning creditor signed the certificate, and the debt was of the description mentioned by Mr. *Erskine*, and such as would render the bankrupt's certificate null and void, I shall admit such evidence, though it may have the effect of impeaching the commission itself.

Vid. stat. 24 *Geo.* II. ch. 57. sec. 9.

The evidence was accordingly admitted: it did not go the length stated by the plaintiff's counsel, but it was satisfactorily proved by other evidence, that the bankrupt had, previous to his bankruptcy, gambled to a great extent in the public funds, and lost very considerable sums of money on account of differences.

Lord KENYON told the jury, That, if they believed the evidence, the certificate was void under the provision of the statute 5 *Geo.* II. ch. 30; and that they should find for the plaintiff.

Verdict for the plaintiff.

Erskine and *Wigley* for the plaintiff.

Garrow, *Gibbs*, *Park*, and *Warren*, for the defendant.

HEBDEN

1801.

Hebden *v.* Hartsink et alt.

Same day.

ASSUMPSIT by the plaintiff, for wages as a clerk to the defendants.

Pleas of *non-assumpserunt* and a set-off.

To prove payment of 140*l*. in part discharge of the plaintiff's demand, the defendants gave in evidence, that they had given him bills of the house to that amount.

It was contended, for the plaintiff, that, before this could be deemed a discharge to that amount, the defendants should prove the bills to have been paid.

Lord Kenyon said, it was not necessary. That, where a party took bills in payment of a debt, he would presume the money was received, unless the contrary was shewn.

Erskine and *Wigley* for the plaintiff.

Garrow, *Gibbs*, *Park*, and *Warren*, for the defendant.

Peters *v.* Brown.

Same day.

ASSUMPSIT for money lent, with the usual money-counts. Pleas of non assumpsit, the statute of limitation, and a set-off.

To prove an acknowledgment by the defendant of the debt [47] within six years, the plaintiff called a witness, to whom the defendant was also indebted, and who having called on him for money, the defendant said, "I suppose you want money; but I can't pay you; I must pay Mr. *Peters* (the plaintiff) first, and then I'll pay you."

It was objected: That there was no acknowledgment of the debt to the party himself, who had not then demanded it.

But Lord Kenyon ruled it to such an acknowledgment as took it out of the statute; and the plaintiff recovered.

Erskine and Lawes for the plaintiff.

Garrow for the defendant.

Virany, Executor, *v.* Warne.

ASSUMPSIT for work and labour by the plaintiff's testator in his lifetime.

The plaintiff's counsel, in stating the case to the jury, said, that the action was brought to recover a sum of money due to the testator,

1801.

VIRANY, Executor, v. WARNE.

testator, for acting as an arbitrator on the part of the defendant, in a dispute which he had had with his partner.

Lord KENYON interrupted him, by saying, That he conceived the action was not maintainable: That the appointment of an arbitrator was not of such a nature as to raise a demand for payment; and that he should tell the jury, that his opinion was, that the plaintiff was not entitled to recover any thing, unless she could prove an express promise. [48]

Nonsuit.

Scarlett for the plaintiff.

CHATERS v. BELL et alt.

July 9th.

If a foreign bill of exchange is regularly protested and noted, the protest may be drawn up in form at any time afterwards.

THIS was an action of assumpsit, to recover the amount of a bill of exchange for 191*l.* drawn from *Ireland* by the plaintiff, as indorsee, against the defendant, as indorser, who resided in *Liverpool.*

The bill was payable in *London,* at the house of *Thomas Carter;* it became due the 24th of *April,* on which day it was presented at the house of Mr. *Carter,* and refused payment, on the ground of there being no effects: it was then noted, and, on the 25th, returned to the banker's by the notary.

It was regularly returned to *Liverpool,* and the money demanded of the defendants, who at first offered to pay the amount, together with some charges, amounting together to 191*l.*: this was not then accepted; and being afterwards again demanded, the defendants refused to pay it, because there was no regular protest.

On the 14th of *May* afterwards, the notary who had noted it, protested the bill in form, and the present action was brought.

The defence set up was, the want of a protest, which, it was contended by the defendant's counsel, was necessary and essential to give a title to the holder to demand the money; and which protest ought to be drawn up and dated of the same day with the refusal of payment of the bill. They cited *Gale* v. *Welsh,* 5. *T. Rep.* 239. [49]

The plaintiff's counsel relied on the usage, to note the bill merely for non-acceptance or non-payment, by the notary who presented it; and that he could draw up the protest in form at any subsequent time; and cited *Bull.* N. P. 271.

Lord KENYON said, he was of opinion, that, if the bill was regularly presented and noted at the time, that the protest might be made at any future period. It was certainly necessary to have the

1801.

CHATERS v. BELL et alt.

the protest, for the purpose of litigation; as in declaring on the bill, if it was a foreign one, the case cited had decided, that the protest must be stated and proved; but that case went no further, and was silent as to the time when the protest should necessarily be made; but though not made at the time of the refusal, if regular notice of non-payment had been given, he thought the want of an actual protest afforded no justifiable ground in law to the indorser to refuse payment of the bill.

On the application of the defendant's counsel, the point was reserved. Verdict for the plaintiff, subject to the opinion of the Court.

Erskine and *Courthope* for the plaintiff.

The *Attorney-General* and *Gibbs* for the defendant.

The case came on afterwards to be argued, but a *venire facias de novo* was awarded, and the cause came on again to be tried before Lord ELLENBOROUGH, who expressed himself to be of the same opinion with that delivered in this case by Lord KENYON.

[50]

July 12th.

Doe ex dem. STEPHENSON v. WALKER.

When witnesses to a will are dead, and it is impeached on the ground of fraud in the procuring of it, and that fraud is imputed to the witnesses, evidence may be called to their character.

THIS was an ejectment brought to recover the possession of lands and premises in *London*.

It had been before tried (*ante* vol. 3 p. 284.) when the present defendant recovered as heir at law.

The lessor of the plaintiff claimed as the devisee under the will of *Mary Robinson*, who had died seised of the estate in question.

The validity of the will, which was regularly executed in point of form, was impeached, on the ground of total incapacity in the testatrix to make any will at the time the present will was supposed to have been made.

The names of three witnesses were regularly subscribed, as attesting its execution. These witnesses were a Mr. *Gale*, an attorney by whom it was prepared, one *Reynolds* his clerk, and one *Cooperson*. The two former witnesses were dead; and *Cooperson* was called to impeach the validity of the will which he had attested, having done so successfully at the former trial.

The testatrix died at *Rumford*, in *Essex*, where she had resided for some years; and the will was dated in the year 1786.

The evidence of *Cooperson* was, That, on the day the will bore date, he was brought in a chaise to *Rumford* by *Stephenson*, the devisee, in company with *Gale* and *Reynolds*, the two other witnesses

nesses to the will: That about 11 o'clock at night (he having been there many hours before) he was called into the testatrix's room, where *Gale* and *Reynolds* then *were, and had been there for some length of time before: That the will lay on the table, signed by *Gale* and *Reynolds*, but they had not signed it in his presence: That the pen was put into the testatrix's hand, for the purpose of signing her name to the will: That she seemed to be in a state of stupid insensibility, and unable to write: That her hand was guided, and her name so subscribed, without her seeming to know what she did. [*51]

The credit of this witness being much shaken by the cross-examination of *Garrow*, of counsel for the plaintiff, it was then proposed to call witnesses to the characters of *Gale* and *Reynolds*, they being dead, and the whole of the question turning upon the credit which was due to their attestation.

This was opposed by *Gibbs*, for the defendant, who relied on the case of *Doe* on the demise of *Farr* v. *Hicks*, tried at *Winchester*, before Mr. Justice BULLER; in which case an attorney had been charged with having imposed a fictitious will on a testator *in extremis*; and in which case he stated, that it was proposed to call witnesses to the character of the attorney; but the evidence was rejected by that Judge, who took this distinction, that, where a particular fraud was imputed to a party, general evidence to character was inadmissible; but that it was otherwise where general character was put in issue.

Lord KENYON said, That he was of opinion, the evidence was admissible. The general rule was as laid down by the defendant's counsel; but there might be exceptions to it. In the great case of *Jolliffe*'s will, Lord *Dudley* and *Ward*, and other persons were [52] examined as to the character of the person by whom the will was prepared, and the legality of admitting such evidence was not doubted.

The evidence was therefore received.

Several witnesses, particularly of the profession of the law, were called, and asked as to the general character of *Gale* and *Reynolds*, and whether they were persons of good reputation, and likely to be guilty of such conduct as was imputed to them. The witnesses all concurring in saying, that they were esteemed to be men of probity and respectability, and not likely to be engaged in a transaction so iniquitous as was supposed.

The jury found a verdict for the plaintiff, in favour of the validity of the will.

 Erskine,

1801.

Doe ex dem. Stephenson v. Walker.

Erskine, *Garrow*, and *Warren* for the plaintiff.

The *Attorney-General*, *Gibbs*, and *Jervis*, for the defendant.

After the recovery in this action, a third ejectment was brought by the heir at law, in the Court of Common Pleas; by the verdict in which the will was again established.

[53]

July 13th.

Savill v. Barchard et alt.

Dyers have a lien on goods sent to them to dye, for the balance of a general account.

THIS was an action of trover for a quantity of baize.

The plaintiff was a manufacturer, and had sent up the goods in question to Messrs. *Green* and *Walford*, his factors, in the month of *December* 1796.

At that time there was a war with *Spain*; but it was expected that peace would shortly take place, when there would be an opportunity of exporting them.

Green and *Walford* spoke to *Lucas* and *Bentley*, who dealt in commodities for the *Spanish* market, telling them, that they had the goods in question; which, when dyed, would suit that market; and wishing *Lucas* and *Bentley* to take them.

Lucas and *Bentley* agreed to take them; but no price was then fixed, as that was to be determined by the event of a peace.

The defendants were dyers, and were applied to by *Lucas* and *Bentley* to dye the baize. It was agreed that they should send for them for the purpose of dying, and so preparing them for the market, on the event of a peace taking place. The defendants accordingly sent for the baize; and they were delivered to them; and the names of *Lucas* and *Bentley* put on them by the defendants.

Lucas and *Bentley* having become insolvent while the goods remained in the hands of the defendants, the plaintiff demanded them as his property: the defendants refused to deliver them,
[54] claiming a lien on them for the balance of a general account due by *Lucas* and *Bentley* to them.

It appeared that the defendants did not know that the goods were the property of the plaintiff; on the contrary, Mr. *Bentley* swore that he believed the defendants conceived them to be absolutely the property of himself and his partner, and that a sale of them had taken place, though the price had not been fixed nor a bill of parcels delivered.

The plaintiff's counsel relied on the case of *Green* v. *Farmer*, 4 *Burr*. 2214; in which it had been expressly decided, That, though

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SAVILL v. BARCHARD et alt.

though dyers might have a particular lien for work done on any specific parcel of goods delivered them to dye, they had none for the balance of a general account.

The defendants' counsel called several witnesses, to prove that the lien claimed by the defendants, was considered in the trade as unquestioned, and was sanctioned by constant use and practice.

It was said to be the case of *Stainton*, assignee of *Fernandez* v. *Davies*; but the term in which it was tried was not stated.

One witness swore, That, having retained a quantity of goods belonging to an insolvent estate, under a similar claim of lien, the assignees had brought an action against him, in which he had succeeded.

Other witnesses swore, That they always understood it to be the practice of the trade; but not being able to prove any particular instances in which it had been asserted, Lord KENYON said, That their evidence went for nothing. One witness, who had been in the trade for thirty years, swore positively, That he had in many instances, claimed the lien, and in some very recent [55] ones against insolvent estates; and that such claims had been acquiesced in.

Lord KENYON said, That the Courts of law and the understandings of people in general, had gone much in favour of liens: That it was established in the case of bankers, packers, and wharfingers, that they were entitled to such lien. That in the case of *Green* v. *Farmer*, Lord MANSFIELD held, That liens arose either from the express agreement of the parties,—from the particular mode of dealing between the parties,—or from the general course and practice of the trade; but in that case, there was no evidence of a lien on any of those grounds; and it was therefore properly held that there was no lien founded on any such custom: but in the present case, there was strong evidence to prove the general course and practice of the trade, and to establish a lien founded on them. It was a question of great general importance. He was of Lord MANSFIELD's opinion in the case of *Green* v. *Farmer*, that a lien was established by the general course and practice of the particular trade; and if the jury thought that such was the general course and practice of the trade, they should find for the defendants.

The jury found a verdict for the defendants; thereby establishing the principle, That dyers have a lien for the balance of a general account.

Garrow, *Park*, and —— for the plaintiff.

The *Attorney-General* and *Gibbs* for the defendants.

1801.

July 16th.

Sir JOHN LAWSON and others, *v.* WESTON and others.

If a bill has been lost, and the loser has advertised it in the newspaper, and it is discounted for the person who found it, and so came fraudulently by it, this entitles the person discounting it to recover the amount, if done *bona fide* and without notice of the way by which the holder became possessed of it.

THIS was an action brought to recover the amount of a country bill of exchange, for 500*l.*, drawn by one *Vazie*, in favour of *Stokoe*, at fifty days, on the defendants, who were the partners of the *Southwark* bank, and accepted by them.

The plaintiffs were the members of the *Richmond* bank, in *Yorkshire*; where they resided. They had discounted the bill in the usual course of their business, at *Richmond*, for a person who brought it to their shop, but who was unknown to them; but the bill had been drawn in their neighbourhood, at *Newcastle*, and they were perfectly acquainted with all the hands-writing of the several parties to it.

The bill had been regularly indorsed by *Stokoe* to a person of the name of *Shears*, who had also put his name on it. *Shears* lost it, or it was stolen from him; but it was proved, that he had advertised it immediately on its being lost.

The names of *Stokoe* and *Shears* were on the back of the bill; and on its being discounted, the person who discounted, was desired to put his name on it; he put the name of *John Warren* on it; and no further inquiry was made by the plaintiffs, who paid him the amount, deducting the discount.

The defendants were indemnified by *Shears*.

The *Attorney-General* stated the grounds upon which the payment of the bill was resisted: That he was in possession of evidence to shew that the bill was the property of *Shears*, by [57] whom it had been lost: That *Shears* had advertised it, and so given notice to have it stopped in payment: That though a person might pay a bill to which he was a party, to one who had come dishonestly by it, by reason of the personal liability attached to his name on the bill,—a banker, or any other, should not *discount* a bill for a person unknown, without using diligence to inquire into the circumstances, as well respecting the bill as of the person who offered to discount it: That it was the usual course of the banking trade, which he was prepared with evidence to shew, that where a bill of the amount of the present was offered for discount, never to do it, without making such inquiries; and that he would call several bankers to prove to that effect.

Lord KENYON. I think the point in this case has been settled by the case of *Miller* v. *Race*, in *Burrow*. If there was any fraud

fraud in the transaction, or if a *bona fide* consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but to adopt the principle of the defence to the full extent stated, would be at once to paralize the circulation of all the paper in the country, and with it all its commerce. The circumstance of the bill having been lost, might have been material, if they could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement; and it would be going great length to say, that a banker was bound to make inquiry concerning every bill [58] brought to him to discount; it would apply as well to a bill for 10*l.* as for 10,000*l.*

With respect to the evidence offered of the usage of other banking-houses, I cannot admit it: it depends on their mode of doing their business, or on their funds. This could not affect others who acted on different principles, but with equal integrity. That which had been called the usage of trade, depended on the different degree of confidence which different men possessed, and not on any settled or regular rules.

The magnitude of the bill has been pressed as a ground of suspicion by the defendants' counsel: I do not feel it of such importance. A person going to the country, and having occasion to bring a sum of money, might prefer bringing it in that way rather than in money. I therefore see no misconduct imputable to the plaintiffs; but I think they are bound, under the circumstances of the case, to prove the value actually paid for it.

The plaintiffs proved the consideration paid for it, and had a verdict.

Garrow, *Gibbs*, and *Espinasse* for the plaintiffs.

The *Attorney-General*, *Erskine*, *Park*, and *Holroyd* for the defendants.

CASES

CASES

ARGUED AND RULED

NISI PRIUS,

ON THE

HOME CIRCUIT.

MAIDSTONE SUMMER ASSIZES, 1801.
CORAM LORD KENYON.

ELLIOTT, Executor of THOMPSON, *v.* ROGERS.

If there is an agreement by deed to demise an house, by words not amounting to an actual demise, the party may maintain an action for use and occupation.

ASSUMPSIT for use and occupation of certain premises belonging to the testator.

The plaintiff proved, that the premises belonged to his testator; and the occupation by the defendant.

The defendant's counsel objected to the form of the action, and contended, That the plaintiff should be nonsuited, as the testator had demised the premises by deed; which they produced.

It was read, and began, "Articles of agreement between ——— *Thompson* (the testator) and ——— *Rogers* (the defendant);" by which *Thompson* agreed to let, and to make a lease to the defendant: and it was there further agreed, that the expenses should be borne between them.

[60] Per Lord KENYON. If there was a demise by deed, the plaintiff could certainly not maintain an action in the present form; but this is not a lease of the premises, it is only an agreement for a lease. The defendant does not hold under the deed; and the action is therefore maintainable.

Verdict for the plaintiff.

Best, Serjt. and *Marryat* for the plaintiff.

Garrow and *Lawes* for the defendant.

HARTSHORN

HARTSHORN et alt. Assignees of WRIGHT, a Bankrupt, v. SLODDEN.

If a creditor obtains goods from a trader on the eve of his bankruptcy by pressing him for payment, and it does not appear to be voluntarily done, in order to give a fraudulent preference, the creditor may hold those goods, though the money due on the security for his debt was not due at the time.

THIS was an action of trover, for a quantity of earthen-ware and glass, the property of the bankrupt, and claimed by his assignees, on the ground of the defendant having become possessed of it by an undue preference.

The case was, That the bankrupt carried on the business of an earthen-ware and glass-shop, in *Canterbury*. He was indebted to the defendant in the sum of 100*l.*; and for that, she had taken a bond payable in *March*, 1801.

On the 29th of *November*, 1800, suspecting the credit of the bankrupt, and that he was likely to fail, she prevailed on him to give her to the amount of 90*l.* in glass and earthen-ware, to cover part of her debt; but it was not in the way of her business to sell such articles, but for the purpose of covering her debt.

[*61]

*On the 6th of *December* following, the bankrupt was arrested; and, while in custody, executed a bill of sale of all his effects, to a creditor; and thereby committed an act of bankruptcy. He was liberated on executing a warrant of attorney, and then absconded; and soon after was declared a bankrupt.

The counsel for the plaintiff contended, That, from the circumstances of the bankrupt being arrested so soon after he had delivered the goods to the defendant, and his then absconding, there was sufficient evidence to shew, that, when he delivered the goods to the defendant, he knew he could not stand; and, of course that this was fraudulent, as he must have known that a bankruptcy was inevitable, and that the creditors would be defrauded; but that the money, being not then due, put it out of doubt.

Lord KENYON said, He had considerable doubts on the case; there was no evidence of fraud, or of voluntary fraudulent preference. He had once been of opinion, that this would be deemed fraudulent; but that he found himself pressed by the case of Mr. *Payne* the bookseller (6 *Term Reports*, 152.), in which the transaction was similar to this, in which the Court of King's Bench held, That a creditor might secure himself, as the defendant had done here: that here, there was no evidence of any act of bankruptcy committed, or in contemplation; if, therefore, the case stood clear of the circumstance of the debt not being due when the goods were delivered to the defendant, he much

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HARTSHORN et alt. Assignees of WRIGHT, a Bankrupt, *v.* SLODDEN.

[*62]

much doubted whether he should not be bound to direct the jury to find for the defendant; but that circumstance formed a new feature in the case; *that, he thought, distinguished it from the decided case; and he should direct the jury to find for the plaintiff; but the defendant should have liberty to move to set it aside without costs.

Verdict for the plaintiff.

Garrow, *Best*, and *Espinasse*, for the plaintiff.

Shepherd and *Harvey* for the defendant.

In the next term the Court of Common Pleas was moved for a rule to shew cause, Why the verdict should not be set aside and a nonsuit entered? which rule was afterwards made absolute.

Vid. 2 *Bos.* & *Pull.* 582.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

KING'S BENCH,

MICHAELMAS TERM, 42 GEORGE III. 1801.

SITTINGS AFTER TERM.

GEORGE *v.* PERRING et alt. Sheriff of Middlesex. *Nov.* 30th.

Where more than the sum allowed by statute has been taken for a bail-bond, by an officer of the sheriff who keeps a lock-up house, but who was not the officer to whom the warrant was directed, but to whose house the defendant was brought after being arrested, no action will lie against the sheriff.

THIS was an action of debt on stat. 32 *Geo.* II. ch. 28. brought to recover the penalty given, for taking above the sum allowed by the statute from the plaintiff, on the taking a bail-bond.

The case stated on the part of the plaintiff was, That a bailable writ having issued against the plaintiff, at the suit of one *Savill*, marked for bail for 12*l.* 10*s.*, he was arrested under it, and carried to the house of one *Evans*, who kept a lock-up house: *Evans* was a sheriff's officer, but not the *officer who made the arrest; nor was the warrant directed to him, but to another officer: while the plaintiff was in custody at *Evans*'s, he entered into the bail-bond in question, and paid *Evans* for it 2*l.* 12*s.* 6*d.*

The plaintiff proved the issuing of the writ; and was preparing to call the sheriff's officer who made the arrest, to prove the circumstances that took place at *Evans*'s house, and the payment of the money to him for the bail-bond.

[*64]

It was objected that the warrant of the defendants to the officer should be produced.

It

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GEORGE v. PERRING et alt. Sheriff of Middlesex.

It was answered and contended by the plaintiff's counsel, That he having been brought to *Evans*'s house after having been arrested, the warrant was delivered to him, and kept by him after the bail-bond was entered into.

Lord KENYON. The plaintiff can proceed no further without the production of the warrant; but I am of opinion, That the action is not maintainable under the circumstances of the case.

This is an action against the sheriff for the misconduct of his officer, who, under colour of his office, has extorted from the plaintiff a sum of money, for the charges of a bail-bond, beyond the sum allowed by law. It might be sufficient to say, that the sheriff must be connected with the acts of his bailiff, who must appear to have been acting under his authority at the time of committing the illegal act; and that has not been done here, for the warrant which gave the authority has not been produced:
[65] but there is more in this case; the sheriff must be made criminal by the act of his officers, not as officers generally, but as such in the particular case in question; it must appear that he had entrusted them with his authority in the particular case in which they had abused it; and the delegation of that authority must appear by his having in that case directed his warrant to them. In this case, the extortion was committed by *Evans*; but he was not the officer to whom the warrant was directed; the house of *Evans* was not the sheriff's gaol; nor was the plaintiff, while there, in the sheriff's custody. Though *Evans* may be answerable for his own extortion in another action, he cannot, by his act, make the sheriff criminal in a case in which he was neither entrusted nor concerned.

The plaintiff was nonsuited.

Erskine and *Manley* for the plaintiff.

Garrow and *Espinasse* for the defendant.

DAWSON, Gent. *v.* Sir ROBERT LAWLEY, Bart.

If an attorney is employed by a person to act for him, after an award has been made against him, and he is desired to do what is needful, he shall be thereby warranted to carry the whole award, as far as respects his client, into effect, though his immediate business was to do but part of it.

ASSUMPSIT by the plaintiff, who was an attorney, to recover the amount of his bill, for business done in preparing a release.

The defendant having been engaged in an arbitration, the arbitrator

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DAWSON, Gent. v. Sir ROBERT LAWLEY, Bart.

arbitrator had awarded, that he should pay a sum of 5*l.* and that he and the other party * to the arbitration should execute to each other mutual releases.

The plaintiff was not the regular attorney for the defendant, but had been employed by him to pay the 5*l.*; and, on being so employed, he said, That he would take care that Sir *Robert Lawley* should have no more trouble about the business: upon which he was told by the defendant to do the needful. [*66]

Afterwards, discovering that, beside the payment of the 5*l.* the parties were to execute mutual releases, he had prepared a release pursuant to the award; for which the defendant refused to pay.

It was contended by his counsel, That this was a special retainer for one purpose only, the payment of the 5*l.* under the award: That the plaintiff, not being the regular attorney of the defendant, an express order ought to be proved to do the business in question, or he could not recover.

Lord KENYON said, That that, as a general position, might be true; but that the defendant, having given orders to the plaintiff to do what was needful, thereby authorized him to take such steps as were directed by the award to which the payment of the 5*l.* immediately had relation; and that the executing of mutual releases being also part of the award, it came within the scope of his authority, and that the plaintiff was entitled to recover.

Verdict for the plaintiff.

Garrow and *Marryat* for the plaintiff.

Mingay for the defendant.

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DICKINSON *v.* SHEE.

December 4th.

If a witness called by the plaintiff has been examined, cross-examined, and quitted, and the defendant has afterwards occasion to call the same witness back to prove his case, the counsel for the defendant is not bound to examine as in chief, but may put leading questions, as in cross-examination.

ASSUMPSIT for servant's wages.

Plea of non-assumpsit as to all except 5*l.* 5*s.*, and as to that sum a tender.

To prove the plaintiff's case, his counsel called a servant who had lived in the defendant's family. She was examined, cross-examined, and proved the plaintiff's service, so as to entitle him to recover.

When the plaintiff had finished his case, the defendant's counsel was proceeding to prove the tender. A witness was called, who

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who failed in doing it; so that it became necessary to call back the servant who had been first called by the plaintiff, to prove the tender.

Garrow, for the defendant, was proceeding to put this question as a leading one, "Did you not see your master tender the plaintiff the sum of 5*l*. 5*s*. on account of his wages?"

Mingay, for the plaintiff, objected to this mode of examining the witness, contending, that the witness having been examined, cross-examined, and quitted,—by being brought back to be examined, to prove the defendant's plea, she should be examined as a witness called in chief to prove the issue; and that the question should not be put in that leading shape.

Lord KENYON ruled, That the witness having been originally called by the plaintiff, and examined as his witness, the privilege [68] of the defendant to cross-examine, remained in every stage of the cause, and for every purpose; and that the question was therefore properly put by the defendant's counsel.

Under a plea of tender, where the plaintiff disputed the quantum, to prove a tender some money must be proved to be produced, though it is not necessary to prove the exact sum.

To prove the tender, the defendant gave in evidence, That he and a friend had gone to the chambers of the attorney for the plaintiff, and said, that he was come to settle with him the account of the plaintiff: That he produced a paper, containing a statement of the account, in which he made the balance 5*l*. 5*s*.; which he said he was ready to pay; but he produced no money nor notes: The plaintiff's attorney said, He could not take that sum, as his client's demand was above 8*l*.

Garrow, for the defendant, contended, That this was a sufficient tender, by the plaintiff's attorney having objected to the quantum of the sum demanded; relying upon the rule, that if, at the trial, the sum which the defendant had proposed to give was found to be the right one, it dispensed with the necessity of an actual production of the money.

Lord KENYON said, That, when there was a dispute as to the amount of the demand, the plaintiff, by objecting to the quantum, might dispense with the tender of the actual, or of any specific sum; there should, however, be an offer to pay, by producing the money, unless the plaintiff dispensed with the tender expressly, by saying, that the defendant need not produce the money, as he would not accept it; for, though the plaintiff might refuse the money at first, if he saw it produced, he might be induced to accept of it.

[69] Verdict for the plaintiff.

Mingay

Mingay and *Humphreys* for the plaintiff.
Garrow for the defendant.

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DICKINSON *v.* SHEE.

Vid. *Douglas* v. *Patrick*, 3 *Term Rep.* 684. *Black* v. *Smith*, *Peake*, N.P. *Cas.* 88.: which latter case seems rather *contra*.

COTTERELL *v.* GRIFFITHS.

Where the plaintiff is entitled to lights by means of blinds fronting a garden of the defendant's which he takes away, and opens an uninterrupted view into the garden, the defendant cannot justify making an erection to prevent the plaintiff so doing, if he thereby renders the plaintiff's house more dark than before.

THIS was an action on the case, against the defendant, for obstructing the plaintiff's lights.

Plea of Not guilty.

The plaintiff proved, That he was possessed of an ancient house, the windows of which looked into the defendant's garden: That the defendant had erected a large paling, which had completely darkened them; and there rested his case.

The defence relied upon by the defendant's counsel was, That the windows had never been completely open, but had had blinds fastened to the window-frames, which prevented the plaintiff from seeing into the defendant's garden, the blinds sloping upwards, and only serving for the admission of light: That the plaintiff had thrown down those blinds, and thereby opened a full and uninterupted view over the defendant's premises, and thereby deprived him of the privacy and retirement of his garden: That the plaintiff having only a qualified * right of enjoyment by means of the blinds, could not alter it to an uninterrupted view over the defendant's garden, to prejudice him in the enjoyment of it; and that it was therefore lawful in him to prevent the plaintiff from that mode of enjoyment, to which he was not entitled. [* 70]

Lord KENYON asked, if the paling erected by the defendant, in the front of the window, had rendered the rooms more dark than they were when the blinds only were up?

Being answered, that it did, his Lordship said, That the plaintiff was clearly entitled to recover: That, to sustain this action, a total privation of the light was not necessary; any thing which tended to deprive a person of the enjoyment of the light and air, in the same quantity to which his house was entitled as an ancient messuage, entitled him to an action; That here it was admitted, that, since the erection of the nuisance complained of, he had not the same quantity of light as before while the blinds remained, and that that was such a privation as entitled him to recover in the action.

It

1801.

COTTERELL v. GRIFFITHS.

It was urged for the defendant, That one of the windows affected by the erection, was not an ancient one, but broke out by the plaintiff in the wall which joined the defendant's garden; but, upon examination, it was said, by a witness, to have been broken open thirty years ago.

Lord KENYON said, That was sufficient: That, though a person could not break out windows, and give them then the privilege of ancient lights, in the case of *Upsdell* v. *Wilson*, before Lord Chief
[71]
Just. WILMOT, he had held, that if the windows were open twenty years, or, perhaps, less, that gave the owner of the house such a right, that they could not be obstructed; and that had been since considered as the law on the subject.

Verdict for the plaintiff.

Garrow and *Harrison* for the plaintiff.

Gibbs and *Reader* for the defendant.

Vid. the case of *Lewis* v. *Price*, *Worcester* Summer Assizes, 1761, Coram WILMOT, Chief Justice. Espin. Dig. N. P. 636.

Dec. 11th.

WILSON v. PAGE.

Where, in trespass for digging gravel, &c. on the waste, the defendant justifies under a usage for the tenant of a particular copyhold tenement to dig gravel, &c. he shall not be allowed to give evidence of a general usage to that effect in all the copyholders.

THIS was an action of trespass, for cutting turf, and digging sand, loam, and gravel, on Hampstead Heath.

The defendant justified under a custom for the tenants of a particular copyhold tenement parcel of the manor stated in the plea, to cut turf and dig sand, loam, and gravel, to be used and spent on the tenement.

Issue was joined on the custom stated in the plea.

The plaintiff proved the trespass committed by the defendant, and then closed his case.

The defendant then offered to call witnesses, to prove a general usage for all the copyholders of the manor at large, to cut turf, dig gravel, loam, &c.* but without being able to prove the particular usage as to the tenement stated in the plea.

Gibbs, for the plaintiff, objected to this general evidence, and
[*72]
contended, That the defendant should be confined in his evidence to the proof of the particular usage stated in the plea; and should not be permitted to go into evidence applying to all the copyholders of the manor at large.

It was answered by the defendant's counsel, that evidence of a general usage going over the whole manor, necessarily included

that of a particular tenement parcel of the manor, and was therefore admissible. 1801.

WILSON v. PAGE.

Lord KENYON ruled, That such general evidence was inadmissible: That the defendant, having pleaded a custom confined to a particular tenement, should be bound by his plea, and confined to evidence of it only. His Lordship rejected the evidence; and there was a verdict for the plaintiff.

Gibbs and *Wood* for the plaintiff.

Erskine, *Garrow*, and *Lawes*, for the defendant.

ROLFE v. NORDEN.

Dec. 2d.

When a tender has been made in the term, prior in fact to the commencement of the action, but the declaration is of the same term as that refers to the first day of the term, the defendant shall not be allowed to prove the tender in evidence, as there should have been a special memorandum of the day.

ASSUMPSIT for use and occupation, goods sold and delivered, with the common money-counts.

Plea to the whole declaration non assumpsit, except as to 5*l.*; and as to that a tender.

*The action was brought in *Easter* term, which began on the 22d of *April*.

The plaintiff having proved his case, the defendant called a witness to prove the tender of the 5*l.* pleaded.

This witness proved, that he was in company with the plaintiff and the defendant, on the 25th of *April*, on which day the defendant tendered 5*l.* to the plaintiff.

It was then contended by the plaintiff's counsel, that the evidence was inadmissible as an answer to the plaintiff's action; for that the declaration being entitled generally of *Easter* term, it had relation to the first day of term, the 22d, and, of course, the tender being on the 25th, was subsequent to the commencement of the action.

[*73]

It was answered by the defendant's counsel, that the party should not be concluded by fiction of law, which was introduced for the furtherance of justice; and that he should be at liberty to shew the true time when the writ was sued out, and that, in truth, the tender preceded it: That this had been so settled in a case in *Burrow*, of *Morris* v. *Pugh*. [3 *Burr.* 1243.]

* LE BLANC, Justice, said, That he was of opinion, the defendant was bound by the relation of the declaration to the first day of the term, unless there was a special memorandum of the day when it was filed or delivered: That if, in fact, the writ was

* Lord Kenyon was absent, from illness, almost the whole of the sittings after this term.

sued

1801.

ROLFE v. NORDEN.

sued out in term, and the tender was made in term, but prior to the commencement of the action, the defendant ought to have taken out a summons, and compelled the plaintiff to have entitled his declaration according to the truth; and then the defendant's plea would apply to the time appearing on the face of the declaration.

Erskine, *contra*, strongly contended, that he had right, without taking such steps, by producing the writ itself, to shew the true time when it was sued out.

LE BLANC, Justice, said, he should admit it; but with liberty, to the plaintiff to move to set the verdict aside, in case the defendant proved the tender and had a verdict.

The defendant, however, not being able to produce the writ, the plaintiff had a verdict.

Gibbs and *Marryat* for the plaintiff.

Erskine and *Espinasse* for the defendant.

SITTINGS AFTER TERM AT GUILDHALL, IN THE KING'S BENCH.

Dec. 14th.

SAINTHILL *v.* BOUND.

A witness cannot be cross-examined as to what he swore in an affidavit, unless the affidavit is produced.

THIS was an action brought to try whether certain goods taken in execution, under a judgment, confessed by one *Lee*, were the property of *Lee* or of the plaintiff?

[*75]

*A witness was called and examined on the part of the plaintiff. *Gibbs*, of counsel for the defendant, was proceeding to cross-examine him as to what he had formerly sworn in an affidavit.

Lord KENYON interposed, and asked, if the defendant had the affidavit in court, or an office-copy? as it was necessary to have the affidavit to read, before the witness could be examined as to its contents.

The affidavit not being in court, the witness was not cross-examined to it; and the plaintiff had a verdict.

Erskine and ——— for the plaintiff.

The *Attorney-General* and *Gibbs* for the defendant.

1801.

Hulle *v.* Heightman.

When the subjects of a foreign country enter into an agreement conformable to the laws of their own country, they cannot, by a subsequent agreement contravene such laws; and an agreement to such effect cannot be enforced.

THIS was a special action on the case.

The declaration stated, that the plaintiff being a sailor, and the defendant the master of a certain *Danish* ship called the *Neptunus*, that the plaintiff hired himself as a sailor on board the said ship, on a voyage from *Altona* to *London*, and back again to *Denmark*: That it was further agreed between the plaintiff and the defendant, that in case the defendant should not permit the plaintiff to return to *Denmark* in the said ship, he would pay him two months' wages. The declaration then averred, that he had requested him to permit him to return to *Denmark*, or to pay him the two months' wages; *but that the defendant had dismissed him at *London*, and had not paid him the two months' wages, or any wages for the voyage from *Altona* to *London*. [*76]

There were the common counts for work and labour, &c.

The plaintiff and defendant were subjects of *Denmark*, and the ship *Danish* property.

The ship's articles, which were settled by the laws of that country, were given in evidence; they were printed, and proved to be the established form of such contracts.

By those articles, the captain is bound to bring back his crew to *Denmark*, under penalty of life and limb. By another article, it was further provided, that no sailor should demand any money from the captain while abroad; but that every one should content himself with the money received upon hand until the completion of the voyage, to the satisfaction of the captain and his owners; and until such time as the ship and cargo shall be safely landed at *Altona*: and it was to be at all times in the option of the captain to give money to the sailors, or not, when abroad; nor should it be lawful for any of them to demand a discharge while abroad; but each was to be held to complete his voyage, being bound to that effect by subscribing the articles.

There was no clause whatever in the articles by which two months' wages were to be paid in case any of the sailors were dismissed in a foreign country, as the plaintiff had declared. This being made as an objection by the defendant's counsel to the plaintiff's recovering to that amount.

Gibbs stated, that he proposed to give in evidence a collateral agreement, by which the defendant promised the plaintiff, and [77]

1801.

HULLE v. HEIGHTMAN.

the other sailors, to give them two months' wages, in case he discharged them at a foreign port before they returned home.

This was objected to, as varying the written terms of contract, under which the plaintiff had agreed to sail.

LE BLANC, Justice, said, That the plaintiff could not go into any such evidence, as it contravened the laws of the country under which the contract was made; the defendant having bound himself, by the laws of that country under a penalty to bring back the crew which sailed with him. He therefore rejected the evidence.

When sailors have sailed under written articles, by which they are bound to serve to the end of the voyage, if the master, by ill treatment, compels them to leave the ship, they should declare specially for the injury, and cannot go for work and labour.

Gibbs, for the plaintiff, then proposed to go into evidence on the general counts, for work and labour for the part of the voyage performed, from *Altona* to *London*.

This was opposed by the defendant's counsel, on the grounds that under the articles, the sailors were prevented from making any demand for wages until their return to their own country, and the voyage was completed.

It was urged in reply to that, that the evidence went to prove that the captain had, by his own act, put an end to the contract, by compelling the men to leave the ship: That he should not therefore be allowed to avail himself of the articles which, by his own act, he had broken; nor seek to protect himself by a clause in those articles which he himself had rescinded.

[*78]

*LE BLANC, Justice, assented to this, and a witness was called: He proved, that after the delivery of the cargo at the port of *London*, the defendant had ill-treated the crew, particularly by refusing them a proper allowance of victuals. That upon their remonstrating, he told them, "They might go about their business, as he could get enough of their countrymen who would, since there was peace, be glad to work the ship home for their victuals:" That, in consequence of that, the plaintiff and some others had left the ship and gone on shore.

He admitted, however, upon his cross-examination, that the captain had required them to return; but they refused, saying, "It was too late, as they had taken the law of him:" and that he again, before he sailed, required them to join the ship, which they had not done, and he had sailed without them.

LE BLANC, Justice, upon this evidence said, he thought the plaintiff was not entitled to recover: That while the written contract remained open, the plaintiff was bound to proceed on it: if indeed it was rescinded by the act of the defendant, it would be otherwise, but he thought it was not so here: That he could see

many

many dangerous consequences from allowing sailors, upon any disagreement with the captain, to leave the ship; and though the captain afterwards offered to take them back, to hold the contract so completely rescinded, that the sailor should be allowed to proceed generally in an action for work and labour: That if the captain had ill-treated the sailors, so as to make it necessary for them to leave the ship, the sailor should have declared specially for the injury, by which he was prevented from completing his voyage and earning his wages. He therefore nonsuited the plaintiff, giving him leave to move to set aside the nonsuit, and enter up a verdict for 6*l.*, which was the admitted rate of wages for the time the plaintiff was on the voyage.

1801.

HULLE *v.* HEIGHTMAN.

[79]

In the course of the cause, it became necessary to inquire into the laws of *Denmark*, with respect to contracts between sailors and the captain. To prove it, the counsel for the defendant called the *Danish* consul, and were proceeding to ask him as to the law; when the plaintiff asked him, if the law, about which he was about to be interrogated, was written or unwritten law?

He said it was a written ordinance of the government.

LE BLANC, Justice, said, he could not admit parol evidence of it, as it could be proved another way.

Gibbs and *Reader* for the plaintiff.

Garrow and *Espinasse* for the defendant.

In the next term, *Gibbs* moved to set the nonsuit aside, on the ground that, under the circumstances of the law, the plaintiff should have been allowed to have gone into evidence for work and labour; but the Court agreed in opinion with the Judge, and refused the rule.

WHITE *v.* TAYLOR and SIMCOE. [80]

THIS was an action of trespass and false imprisonment.

The defendant *Taylor*, was a constable.

The circumstances of the case were these:—The plaintiff had hired a coach, which was driven by the defendant *Simcoe*. Being dissatisfied with his conduct and insolence, he had got out of the coach, and, intending to punish him, wished to take his number, which he had taken hold of for that purpose. The defendant *Simcoe*, observing his purpose, violently drove away, leaving the number in the plaintiff's hand.

The plaintiff having gone to the watch-house to prefer his complaint,

1801.

WHITE v. TAYLOR and SIMCOE.

plaint, the coachman was sent for, when he charged the plaintiff with having stolen his number. *Taylor* presided in the watch-house as the constable, and on this complaint being made, committed the plaintiff to the *Counter*.

The counsel for *Taylor* relied on the case of *Samuel* v. *Payne*, *Dougl.* and contended, that the charge having been been regularly made before him, he was justified in committing the plaintiff.

Erskine, for the plaintiff, admitted, That if a constable *bona fide* receives a charge, and commits the party charged, however unfounded the charge might be, no action was maintainable against him: but he contended, that where he acted without a
[81] charge, without taking proper care, or using a proper degree of discretion; and where it appeared that the charge was totally unfounded, that it was a matter to be left to the jury, whether the committal was *bona fide*, or an improper exercise of the authority with which he was invested; and which he contended had been the case here.

LE BLANC, Justice. I think it is a matter of law, and not to be left to the jury. If no charge was given, or a collusive one, whereby the constable has made himself a party in oppressing and committing the plaintiff to prison, he will be liable to an action; but that is matter of evidence. He may, if he pleases, use his own discretion, and exercise his own judgment, on a charge made before him; but if the plaintiff cannot make out such a case as amounts to collusion, or that makes the constable a party to the wrong; if a regular charge is made before him, he is warranted by law in committing the party charged: that was the case here, and in my opinion entitles the constable to a verdict. As to the hackney-coachman, he having made the charge knowingly and without foundation, in consequence of which the plaintiff has been imprisoned, is guilty of a trespass; and the plaintiff is entitled to a verdict against him.

Verdict for the plaintiff against *Simcoe*, and for the defendant *Taylor*.

Erskine and —— for the plaintiff.

Gibbs, *Park*, and *Gurney* for the defendant.

WRIGHT

1801.

Wright v. Lawes.

October 17th.

To deprive the vender of goods of the right to stop *in transitu*, it is not necessary that they should be delivered at the consignee's place of abode; it is sufficient if they have come into his possession, and that he has exercised some act of ownership in them.

THIS was a special action on the case.

The plaintiff, by his declaration, complained, That four pipes of *Port*-wine had been sent to him from *London* to *Yarmouth*, where they had been received by his agent, and delivered to the defendant, to be kept and warehoused for him for a certain reward to be paid by him to the defendant, and to be afterwards delivered to him; and then assigned a breach in the non-delivery.

There was a count in trover, and a general plea of Not Guilty to the whole declaration.

The case was, That the plaintiff, who was a manufacturer at *Norwich*, had, in the *June* preceding, entered into an agreement with one *Shevill*, for the purchase of four pipes of *Port*-wine; one of which was to be paid for in money, to the amount of 75*l.*; and for the remainder, *Shevill* was to take goods in which the plaintiff dealt.

Shevill wrote up to his correspondent in *London*, a person of the name of *Farquharson*, to send the wine. He purchased it from *Bamford*, *Bruin*, and Co.; and had the four pipes shipped; and, by the bill of lading, consigned them to the plaintiff by a vessel employed in the course of trade between *Yarmouth* and *London*.

When the wines arrived at *Yarmouth*, one *Boardman*, as the agent for the plaintiff, received the wines on his account; but his own cellars not being large enough to hold them, he applied to the defendant; who took them into his cellars, and was to be paid for the warehouse-room by the plaintiff. [83]

Two days after, the plaintiff came over to *Yarmouth* from *Norwich*, where he lived; went to the defendant's cellars where the wines were deposited, tasted, and took samples of them.

While the wines remained in the defendant's possession, *Bamford*, *Bruin*, and Co. discovering that *Farquharson*, to whom they had sold the wines, was a swindler, and a man of no property; they stopped the goods in the defendant's possession, by giving him an indemnity; and the present action was brought for the recovery of them.

The defendant's counsel stated their defence to be, first, That the plaintiff was concerned in the purchase of the wines by collusion with *Shevill* and *Farquharson*; which being fraudulent, they contended,

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contended, no property could pass by the sale. 2dly, That the wines having been improperly obtained from them, they had a right to stop them *in transitu.*

Upon the first point made, Lord KENYON ruled, That, as the wines had been improperly obtained from *Bamford, Bruin,* and Co., it was incumbent on the plaintiff to shew, that he had fairly purchased the wines, by giving clear evidence of the agreement with *Shevill.*

The plaintiff proved it clearly, and also the payment of the 75*l.* for one pipe.

[84] It was contended by the defendant's counsel, that this entitled the plaintiff to that one pipe only for which he had paid.

Lord KENYON said, That it was an entire agreement; and that on proving the consideration paid for one pipe, and the agreement for the remainder, he should hold, that it gave the plaintiff a title to the whole.

Upon the second point, with respect to *Bamford, Bruin,* and Company's right to stop the wines *in transitu,* the defendant's counsel relied, That the plaintiff living at *Norwich,* the goods must be deemed to be *in transitu* until they arrived there; whereas here, they had arrived only at *Yarmouth;* and had never been delivered at *Norwich:* that the usual course was, to put them into lighters at *Yarmouth,* and forward them to *Norwich;* so that, until their arrival there, they were *in transitu,* and could be stopped by the owners.

For the plaintiff, it was answered, That the goods being sent by sea, if the consignee was ready to receive them when discharged from the ship, that was a delivery, at whatever period of their course of delivery they were so received: That the consignee, was not bound to receive them at his own door: it might suit his advantage to have them delivered at another place; but that here, as the wines were landed, there was a complete delivery; an act of ownership exercised on them by the plaintiff, by taking samples, which, under the authority of the case of *Slubey* v. *Heyward,* 2 *Hen. Blacks.* 504, vested a complete property in the plaintiff.

[85] Lord KENYON. There is no colour for saying that these goods were *in transitu.* I once said, that, to confer a property on the consignee, a corporal touch was necessary. I wish the expression had never been used, as it says too much; but here, if a corporal touch was necessary to confer a property on the consignee, it had taken place; but all that is necessary is, that the

consignee

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consignee exercise some act of ownership on the property consigned to him; and he has done so here: he has paid for the warehouse-room; he has tasted and taken samples of the wines. But it is said, they have not reached the plaintiff's place of abode, where they were to be ultimately delivered; but I think there was a complete delivery at *Yarmouth*. If an action was brought against the plaintiff for the price of the wines, was not the delivery at *Yarmouth* such a delivery as would make him liable for goods sold and delivered? I think it would: the consignee had then ceased to have any further care of them; he had delivered them to the plaintiff's agent, according to the bill of lading; his responsibility was then at an end, and it was transferred to the plaintiff. I am therefore of opinion, that the delivery was complete; and, of course, that there was no right in *Bamford*, *Bruin*, and Co., to stop them *in transitu*.

The plaintiff consented to take a verdict for 75*l.* only, on receiving an indemnity against any action which *Shevill* might bring against the agent.

The *Attorney-General* and *Espinasse* for the plaintiff.

Erskine, *Gibbs*, and *Park* for the defendant.

HOCKLESS et alt. v. MITCHELL. [86]

Where there are several owners of a ship, who bring an action for damage done to her, a release from one of the owners only will be sufficient to render the master a competent witness; neglect being imputed to him, so that he might be liable for negligence over to the owners.

THIS was an action of trespass *vi et armis*, brought by the plaintiffs, who were the joint owners of a sloop, called the *Duke* of *Cumberland*, of *Whitstable*, in *Kent*, to recover damages against the defendant, who was a lieutenant in his Majesty's navy, for the cutting away and destroying the sails and rigging of the plaintiffs' sloop.

The defendant pleaded a justification, that he was, at the time of the trespass committed, commander of his Majesty's gun-brig the *Boxer*, then lying at anchor in the river *Thames*; that the sloop stated in the declaration, was sailing down the river, under the direction and guidance of the plaintiffs' servants, who so negligently and carelessly steered and directed her, that she ran foul of the gun-brig, and became entangled with her; wherefore, in order to extricate her, and for her preservation, he necessarily cut the sails and rigging; which were the trespasses in the declaration mentioned.

The plaintiff new assigned, That the injury was excessive, and not necessary for the purposes justified in the plea.

 Plea

1801.

HOCKLESS et alt. v. MITCHELL.

Plea of not guilty to the new assignment.

The first witness called by the plaintiff was the sailing-master, who had the command of the sloop at the time of the injury.

He was objected to by the defendant's counsel, as inadmissible without a release.

[87] A release was produced; but it was executed by one of the plaintiffs only.

It was for this objected to, as it ought to have been executed by all the plaintiffs on the record, who were the joint owners of the said sloop, and who had sustained the injury.

Lord KENYON ruled, That it was sufficient if the release was executed by one; for that, if an action was brought against the witness for neglect of his duty, in case the plaintiffs did not recover in the present action, it would be a joint action; in which case, a release by one would be pleadable in bar to the joint action.

The witness was then examined.

While the plaintiff was proceeding with his evidence on the case, Lord KENYON said, That, as the issue stood on the new assignment, it was not sufficient for the plaintiffs merely to shew the damage done, it was incumbent on them also to shew, that it was done wantonly and unnecessarily: That, whatever mischief might have been sustained, if it was done under the fair impression and belief that it was necessary for the safety of the defendant's ship, he would not scan some little excess too closely, but would expect clear excess and unnecessary injury to be proved.

Many witnesses were examined on both sides.

The jury found a verdict for the plaintiff.

Erskine, *Park*, and *Espinasse*, for the plaintiff.

The *Attorney-General* and *Jervis* for the defendant.

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[88]

ROBERTS et alt. v. EDDINGTON.

Dec. 21st. The Sound List, containing the account of the arrival of ships there, is not evidence of that fact.

THIS was an action on a charter-party, by which the defendant chartered his ship to the plaintiffs, engaged to go on a voyage from *London* to *St. Petersburg*, and bring home a cargo of deals on their account: dangers of the sea and restraints of princes only excepted, in the common form.

The ship had not proceeded to *St. Petersburg*.

The defence relied upon by the defendant's counsel, was, that the ship, in the course of her voyage, had met with storms and bad weather, which had forced her into *Dantzic* after she had passed

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passed the *Sound;* and that, during her stay there, the *Russian* embargo had been laid on; so that, if the vessel had proceeded to *Petersburg*, the captain and crew must have gone into slavery.

The plaintiffs imputed the failure of the voyage to negligence and misconduct on the part of the defendant, and proposed to give in evidence what is termed the *Sound* List and the *Petersburg* List, which are documents transmitted by the British consuls abroad at those different places to the merchants at home, which are publicly hung up at *Batson*'s coffee-house, for the inspection of the public, and which state the arrival of the different ships at those places. By this evidence, the plaintiffs proposed to prove, that other ships which had sailed in the same fleet with the defendant's ship, and some even long after, had passed the *Sound*, and arrived safe at *Petersburg*, and had afterwards returned safely with a cargo. [89]

Lord KENYON. These lists cannot be received in evidence; they are not bottomed in that, without which the facts which they are offered to prove cannot be legally established before a jury; namely, they are mere representations, and not upon oath, and are therefore inadmissible.

The *Attorney-General* and *Burrough* for the plaintiffs.

Erskine, *Park*, and *Wood*, for the defendant.

EVANS v. DRUMMOND.

Dec. 23d.

In the case of a partner whose name does not appear in the firm, he is liable for goods furnished only during the time he receives a share of the profits, unless he has been known to be a partner; in which case, he shall be liable, after he has actually ceased to be a partner, unless he has given notice of his quitting the concern.

ASSUMPSIT for goods sold and delivered.—Plea of non-assumpsit.

The action was brought to recover the value of a large quantity of hops. The plaintiff charged the defendant, in the character of a partner with one *Combrune*, who had become a bankrupt, and who had carried on the business of a brewer, under the firm of *Combrune and Company;* the plaintiff contending that the defendant had constituted part of that firm.

The plaintiff produced the articles of partnership, dated in the year 1787, between the defendant *Combrune* and one *Bell*, for carrying on the business of brewers; and, by a clause in that *deed, the particular attendance and attention of *Drummond* to the business was to be dispensed with; so that he was virtually but a dormant partner.

In 1792 *Bell* quitted the partnership.

Erskine, for the defendant, stated his defence to be, That the demand of *Evans*, the plaintiff in this action, commenced on the

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EVANS v. DRUMMOND.

5th of *October*, 1799, and ended in the *October* following of the year 1800: That in fact, the defendant, *Drummond*, had actually quitted all concern with the partnership on the 10th of *March*, 1796; so that at the time of the goods being furnished, he had no manner of concern with it. He then contended, that, as *Drummond* was a partner never visible in the concern, that it was not necessary to give public notice of the time when he ceased to be actually so; but that he was not chargeable from the time when the partnership was put an end to.

Lord KENYON asked, if *Drummond*, the defendant, was ever known to be a partner? He added, that it was incumbent on the plaintiff to shew that *Drummond* was ever known publicly in the partnership; as there must be some publicity of his situation, to which the plaintiff might be presumed to trust, otherwise he could only be charged during the time he was actually a partner, and was receiving the emoluments and profits of the business.

The plaintiff then called a witness who had dealt with *Combrune* and Co. He was asked, with whom he conceived he was dealing?

This question was objected to; and Lord KENYON held, that it could not be asked.

[91] He was then asked, if he had ever heard *Combrune* say that *Drummond* was his partner.

This question was objected to, but Lord KENYON said, that it might be asked; for there being a private agreement between *Combrune* and *Drummond* for a partnership, *Combrune* had a right to represent to the world who was his partner, and to charge him accordingly.

A witness was then called, who said, that about three years ago, in the year 1798, *Combrune* had consulted him, and told him, that *Drummond* was discontented with the business, and wished to break up the trade, and go into the table-beer brewery.

Erskine contended, That whatever might be the effect of these declarations of *Combrune* if made during the partnership, yet being made after the partnership had actually ceased, they could not bind him; but not receiving the assent of the Lord Chief Justice to that distinction, he proceeded with his defence.

If two partners give a joint bill of exchange for a partnership demand, and, when the bill becomes due, the holder takes the separate bill of one, the other is discharged.

He stated, that a bill in equity having been filed against the plaintiff, he had, in his answer, admitted, that from the 18th day of *April*, 1800, he had known that *Drummond* was not a partner with *Combrune*. From that time, therefore, he contended, that

there

there was no colour for charging the defendant: That the whole demand of the plaintiff should be therefore divided into two parts; the one prior to the 18th of *April* 1800, and the other subsequent: That that subsequent to the 18th of *April*, could not be charged to the defendant's account, he *having, from that period, [*92] ceased to have any concern with the business, with the full knowledge of the plaintiff. As to that part of the demand preceding the 18th of *April*, it amounted to 753*l.* for hops sold in *November* and *December* 1799. These he should shew were paid for; and for that purpose he produced a bill of exchange for that amount, dated in *March* 1800, at two months, which he stated had been paid.

The plaintiff's counsel admitted the bill, but denied that it had been paid. They stated the transaction to be, that when it became due, which was in *May*, it had been renewed by another bill for the same amount, by *Combrune*.

Per Lord KENYON. Is it to be endured, that when partners have given their acceptance, and where perhaps one of two partners has made provision for the bill, that the holder shall take the sole bill of the other partner, and yet hold both liable? I am of opinion, that when the holder chuses to do so, he discharges the other partner. Here the plaintiff has taken the bill of *Combrune* after he admits, that he was informed that *Drummond* had nothing to do with the concern. It is a reliance on the sole security of *Combrune*, and discharges the defendant.

Verdict for the defendant.

The *Attorney-General*, *Park*, and *Wood* for the plaintiff.

Erskine, *Gibbs*, and *Walton*, for the defendant.

CASES

CASES

ARGUED AND RULED

AT NISI PRIUS,

IN THE

KING'S BENCH,

HILARY TERM, 42 GEORGE III. 1802.

SECOND SITTING IN TERM.

Hayward v. Hague, Gent.

A letter demanding payment of a debt, sent to the defendant's house, and to which an answer is returned, that the demand should be settled, is a sufficient evidence to go to the jury of demand on the issue of a subsequent demand and refusal to a plea of tender.

THIS was an action of debt, for goods sold and delivered. There was a plea of a tender, and a replication of a subsequent demand and refusal, upon which issue was joined.

The amount of the demand was not disputed.

The plaintiff proved a demand in the month of *August*, and several subsequent applications for payment.

The bill was filed against the defendant, on the 17th of *November*. The last application for payment was by letter, dated the 14th of *November*; which was subsequent to the tender which the defendant had made: and the question turned *upon, Whether this demand of payment on the 14th had been legal or not?

[*94]

To this effect the evidence was, That the plaintiff's attorney had sent a letter to the house of the defendant, demanding the money; and at the same time, complaining of his repeated breaches of promise to pay, and threatening to proceed against him. This was proved to have been delivered to a clerk, at the house

house of the defendant; who brought in the letter, and returned with an answer, That it should be settled.

No notice, however, being taken of it for three days, the bill was filed.

Park, for the defendant, objected. That this evidence did not support the issue: That it was necessary to prove either an actual and personal demand, or an actual delivery of the letter containing it, to the defendant himself; neither of which had in this case been done; and that there was, therefore, no evidence of a demand and refusal subsequent to the tender.

LAWRENCE, Justice, said, That there was sufficient evidence of the delivery of the letter at the defendant's house, containing a demand; and an answer coming out, that the demand should be settled, must be presumed to have come from the defendant himself; and that the evidence was sufficient to go to the jury to support the issue.

The plaintiff had a verdict.

Erskine and *Espinasse* for the plaintiff.

Park for the defendant.

GRIMALDI v. WHITE.

[95]

If a party purchases an article at a certain price, pursuant to a specimen exhibited, and, on delivery, it is found to be of inferior performance, the party cannot, in an action for goods sold, set up the inferiority of it to the specimen; he should have returned it, and so have rescinded the contract.

ASSUMPSIT for work and labour.

The defendant paid l. into court; and pleaded *non-assumpsit*.

The action was brought by the plaintiff, who was a miniature painter, to recover the value of several pictures painted by him for the defendant.

It was proved, That the plaintiff painted miniatures of different sizes; according to which the prices varied. Specimens were hung up in his apartment, numbered; and the prices put opposite to the number. The price opposite to No. 8, was fifteen guineas; which number the defendant had had.

The pictures had been sent home; and the defendant, at the time, objected to the execution, as being inferior to the specimen exhibited by the plaintiff; but he had not returned them.

The defence, upon which it was intended to rely, was this inferiority of execution, and of course of value; and the defendant's counsel were proceeding to call witnesses, who were judges, and who had seen the pictures, to prove, that at fifteen guineas they were

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GRIMALDI v. WHITE.

were infinitely overcharged; and to ascertain what was the real value.

This was objected to by the plaintiff's counsel.

LAWRENCE, Justice. In this case it is in evidence, that the charges of the plaintiff are regulated by the different sizes of the pictures, which he exhibits as specimens of his art, and for which [96] he charges the different sums set opposite to the numbers. It is proved, that he has delivered several pictures to the defendant of the size which he ordered; and which the defendant received, and has not returned. The defendant relies on the circumstances, that they are of an execution very inferior to the specimens exhibited, and which the plaintiff undertook to paint conformable to. Where an artist exhibits specimens of his art and skill as a painter, and affixes a certain price to them, if a person is induced to order a picture from an approbation of such specimens, and the execution of it, when delivered, is inferior to the specimen exhibited, he has a right to refuse to receive it, or return it, as not being conformable to that performance which the painter undertook to execute: but if he means to avail himself of that objection, he must return the pictures; he must rescind the contract totally. Having received it under a specific contract, he must either abide by it, or rescind it *in toto*, by returning the thing sold; but he cannot keep the article received under such a specific contract, and for a certain price, and pay for it at less price than that charged by the contract.

The plaintiff had a verdict for the full charge.

Gibbs and *Reader* for the plaintiff.

Erskine and *Burrough* for the defendant.

[97]

FORES v. JOHNES, Esq.

Assumpsit will not lie to recover the value of prints of an obscene, immoral, or libellous tendency.

THIS was an action of assumpsit, for goods sold and delivered.

Plea of *non-assumpsit.*

The plaintiff was a printseller in *Piccadilly*; and the action was brought to recover the value of a quantity of caricature prints, sold by him to the defendant.

The order, as proved to have been given by the defendant to the plaintiff, was, "For all the caricature prints that had ever been published." Under this order, the prints in question had been sent to the defendant's house in *Wales*.

The

The defendant refused to receive them, on the ground, that the collection contained several prints of obscene and immoral subjects; exclusive of several being duplicates.

The plaintiff's counsel contended, That the order was general and comprehensive, without any exception as to the subject; and that the plaintiff, therefore, having sent prints of every description, was entitled to be paid for them.

Per LAWRENCE, Justice. For prints, whose objects are general satire or ridicule of prevailing fashions or manners, I think the plaintiff may recover; but I cannot permit him to do so for such whose tendency is immoral or obscene; nor for such as are libels on individuals, and for which the plaintiff might have [98] been rendered criminally answerable for a libel.

The cause was referred.

Erskine, *Park*, and *Dampier* for the plaintiff.

The *Attorney-General* for the defendant.

SITTINGS AFTER TERM AT GUILDHALL.

MARSH v. ROBINSON.

A person who make insurances as the owner of a ship, must stand so registered at the Custom-house at the time; and the production of the register from the Custom-house is conclusive evidence of ownership.

THIS was an action of *assumpsit*, on a policy of insurance on the ship *Speculation*, from *Ipswich* to *Chester*.

Loss by capture.

The defence was, That the interest was not truly averred to be the plaintiff's.

The policy was effected in the names of *Elizabeth Marsh* and Son. The action was brought in the name of the son only; and the first objection arose on the face of the policy itself.

It appeared, however, by the pleadings, that there was an averment in the declaration, that the plaintiff was solely interested.

LE BLANC, Justice, was of opinion, That this averment let the plaintiff in to prove a sole interest in himself, notwithstanding the policy bore the joint names of two.

To prove the sole ownership in the plaintiff, his counsel relied on the evidence of the captain, who had been examined on [99] interrogatories, in consequence of his being absent from the kingdom. The evidence was to this effect: "That he was recommended

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MARSH *v.* ROBINSON.

commended to the plaintiff by one *Lacy;* having been unknown to him before that time: That the plaintiff verbally gave him instructions to go on board the ship and take the command of her, to pay the seamen, and to draw bills on him for the use and on the account of the ship."

It was objected by the defendant's counsel; That this evidence was insufficient to establish the fact of ownership in the plaintiff, as the acts spoken to by the plaintiff's evidence were such as might be done by the agent or broker for the ship, and proved no absolute act of ownership whatever.

But Mr. Justice LE BLANC was of opinion, That these acts were *prima facie* evidence of sole ownership, sufficient to call on the defendant to prove, that the ownership was not sole, as the plaintiff represented.

The defendant's counsel stated, That the evidence he had to offer was that of the registry from the custom-house; by which it would appear, that, on the 31st of *October*, 1800, when the insurance was made, the ship stood registered at the custom-house as belonging to *Cummins*, *M'Master*, and Co.; and that there was no change in the registry till *March*, 1801, when the present one to the plaintiff was made.

Per LE BLANC, Justice. I think this conclusive evidence. By Lord *Liverpool's* act, *Geo.* III. where there is any change [100] in the ownership, there must be an indorsement on the certificate of registry, accompanied by the oath of the parties. In the case of *Camden* v. *Anderson* (5 *Term Rep.* 709.) one of the persons, who was part-owner, was held not to have an insurable interest for want of the register. That, therefore, is the legal evidence of ownership; and as it appears in this case, that at the time of the underwriting the policy, the plaintiff was not an owner standing in the registry, I think he had not an insurable interest, and must be called.

Erskine, *Adam*, and *Gibbs* for the plaintiff.

Garrow and *Park* for the defendant.

MATHEWS *v.* HAIGH.

The existence of a suit in a particular term preceding, may be proved by producing the declaration, though it will not prove the commencement of the suit.

ASSUMPSIT for money lent and advanced, with the common money counts.

The defence was, That the plaintiff had taken acceptances of the

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MATHEWS v. HAIGH.

the defendant's in discharge of his debt, which were not due at the time of the action.

A bill in equity had been filed, which had delayed the trial of the cause.

It became material to ascertain the time when the cause was commenced.

The suit was by original, and the record was of the *Hilary* term, issue having been joined in it. It was asserted by the defendant's counsel, That the suit was commenced, as of *Easter* term preceding.

They were not prepared with any copy of the writ, which had been sued out; but produced the declaration which had been [101] delivered in *April*, 1801.

This was objected to by the plaintiff's counsel, who contended, That the commencement of the suit could only be proved by the production of the writ itself, or of an office copy of it. That every case must be proved by appropriate evidence; the suing out of the writ was the commencement of the suit, and of course that commencement could be proved by the writ itself only, and not by the declaration, which was a subsequent step in the cause.

It was answered by *Gibbs*, for the defendant, That he did not offer the declaration as evidence of the commencement of the suit; but he contended, That it was evidence of a subsisting suit at the time of which it was entitled, it being a proceeding in a cause which must be presumed to have been then commenced.

LE BLANC, Justice, said, That it was not the legal evidence of the commencement of the suit, nor could it be admitted for that purpose, the production of the writ being the legal evidence to ascertain that time; but he was of opinion, That it was evidence to establish the fact of an existing suit at the time of its being delivered.

The *Attorney-General* and *Lawes* for the plaintiff.
Gibbs and *Littledale* for the defendant.

The causes in the King's Bench not being concluded at the commencement of the circuit, they stood over until the week prior to *Easter* term.

In the course of the vacation, Lord KENYON, Chief Justice, died at *Bath*. [102] He was succeeded by the *Attorney-General*, Sir *Edward Law*, who, on his appointment, was created a Peer, by the title of Lord ELLENBOROUGH.

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April 27th.

Mawson *v.* Hartsink and Others.

Where a person is called to impeach the credit of a witness called before, what shall be evidence.

ASSUMPSIT against the defendants, on two bills of exchange by the plaintiff, as indorsee of the defendants, who had been partners in a bank, called *The Security Bank.*

One of the defendants, *Playfair*, let judgment go by default; the two others pleaded bankruptcy, having obtained their certificates.

Their certificates were impeached, on the grounds of the two defendants having been guilty of concealment; having lost money by gaming in the stocks; and that money had been given to induce creditors to sign their certificates.

The facts, upon the part of the plaintiff in impeaching the certificate, were proved by a witness of the name of *Stanley Leathes.*

The defendants proposed to impeach the credit of this witness, as a person of infamous character, and not entitled to credit.

The first witness was a person of the name of *F. Reeves*, the chief clerk of the office at *Bow-street.*

He was asked as to his knowledge of *Leathes*; and whether he would believe him on his oath?

[103] He said, he had been before the justices at *Bow-street*; and from what passed there, he thought him a person whom he should be very unwilling to believe.

Lord Ellenborough interfered, and said, He could not hold this to be evidence. The transaction was *ex parte*; it was upon a partial adduction of evidence on a charge against him at a public office, from whence he had received an unfavourable opinion of *Leathes*, from a story told without an oath. If the witness derived his information from any particular source, falling within his own knowledge, it might be otherwise.

Garrow then asked, Whether, in consequence of what passed at the public office, he had made particular enquiries as to the witness's general character?

Lord Ellenborough. That cannot be evidence. That information must be from persons not on their oaths; perhaps not credible. If this was allowed, when it was known that a witness was likely to be called, it would be possible for the opposite party to send round to persons who had prejudices against him, and from thence to form an opinion, which was afterwards to be told in court, to destroy his credit.

Garrow

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Garrow then put his question in this way: "Have you the means of knowing what the general character of this witness was? and from such knowledge of his general character, would you believe him on his oath?

Lord ELLENBOROUGH said, The question might be put in that way, as it would then be open for the opposite side to ask, [104] as to the means of knowing the witness's character; so that it could be judged of what degree of credit was due to the assertion, from the means that the witness then called, had of informing himself and forming his judgment.

Verdict for the plaintiff.

Erskine and ——— for the plaintiff.

Garrow and *Warren* for the defendants.

GARRATT et alt. Assignees of SADLER, a Bankrupt, v. Sir THEOPHILUS BIDDULPH.

Though a commission of bankruptcy may be rendered void by reason of the petitioning creditor taking money or goods from the bankrupt, it cannot be considered as void in an action at law, but can only be superseded by the Chancellor, under statute 5 *Geo.* II.

THIS was an action of trover, brought by the plaintiffs, as the assignees of one *Sadler*, a bankrupt, against the defendant, who was sheriff of *Warwickshire*, to recover the value of a considerable quantity of property which had belonged to the bankrupt, and which had been taken in execution by the defendant, under a *fieri facias*, directed to him at the suit of *Slade, Sadler*, and Co.

The writ had issued in consequence of a judgment confessed by the bankrupt to *Slade, Sadler*, and Co ; and was impeached by the assignees, on the ground of its being a fraudulent preference.

The act of bankruptcy was proved to have been committed on the 17th of *January*, 1801.

The commission was sued out on the petition of one *Pountney*, and was dated the 27th of *January*, 1801.

The goods in question had been taken, under the *fieri facias*, [105] on the 21st of *January*, 1801.

The act of bankruptcy having been established after some contest, and the rest of the case having been proved, the counsel for the defendant gave the following facts in evidence, by a witness whom they called:

That, on the 31st of *January*, which was after the bankruptcy of *Sadler*, he had been in company with the bankrupt and *Pountney*: That the bankrupt was possessed of a fowling-piece, of the

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GARRATT et alt. *v.* Sir THEOPHILUS BIDDULPH.

value of about 5*l.*: That the bankrupt gave it to *Pountney*, saying, take this, it will lessen your debt: That *Pountney* assented; and took the gun, as the witness believed, to his own use: That the bankrupt then added, that he expected some money from one *Reynolds*; that he would help him to it, and make it over to *Pountney*: That *Pountney* answered, he wished he would, as he was very poor; and that he would not have struck the docket, had he not been compelled to do it.

Reynolds was then called, and he proved that he was indebted to the bankrupt, and that the bankrupt had directed him to pay over to *Pountney* the money which he owed him: That the witness agreed to it; and *Pountney* charged him in account with it; but that he had not yet paid it.

Upon this evidence, the counsel for the defendant relied upon the following clause of the statute 5 *Geo.* II. c. 30.; by which it is enacted, "That if any bankrupt or bankrupts shall, after issuing of any commission against him, her, or them, pay to the person or persons who sued out the same, or otherwise give or deliver [106] to such person or persons goods, or any other satisfaction or security for his, her, or their debt, whereby such person or persons suing out such commission shall privately have and receive more in the pound in respect of his, her, or their debt, than the other creditors, such payment of money, delivery of goods, or giving greater or other security or satisfaction, shall be deemed and taken to be such act of bankruptcy whereby, on good proof thereof, such commission shall and may be superseded; and it shall and may be lawful for the Lord Chancellor, the Lord Keeper, or Commissioners for the custody of the great seal of *Great Britain* for the time being, to award to any creditor or creditors petitioning another commission; and such person or persons so taking or receiving such goods, or other satisfaction as aforesaid, shall forfeit and lose, as well his, her, or their whole debt, as the whole he, she, or they shall have taken or received; and shall pay back and deliver up the same, or the full value thereof, to such person or persons as the said commissioners, acting under such new commission, shall appoint, in trust for, and to be divided amongst the other of the bankrupt's creditors, in proportion of their respective debts."

They then contended, that this case came within the words of the statute, and the commission was at an end.

Mr. Justice LE BLANC having referred to the statute, said, That [107] he was of opinion that the evidence offered, even giving it its full effect,

effect, was not sufficient to put an end to the commission. That the act had not declared the commission void, nor had it given the courts of law any jurisdiction over the question; it had pointed out the course to be pursued, and was in that respect compulsory, namely, by application to the great seal; by whom the statute declared it should and might be superseded, and then gave further powers to the Lord Chancellor. That, as long, therefore, as it stood not superseded, in consequence of any order made by the Lord Chancellor, in pursuance of the powers given to him by the statute, he was bound to consider it as a good and subsisting commission.

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GARRATT et alt. *v.* Sir THEOPHILUS BIDDULPH.

The plaintiffs had a verdict.

Erskine, *Park*, and *Barrow* for the plaintiff.

Garrow and *Gibbs* for the defendant.

In the next term the defendant obtained a rule to shew cause why the verdict so obtained should not be set aside, and a verdict entered up for the defendant; but the court discharged the rule.

TABBS *v.* BENDELACK*. [108]

An *American* who resides with his family in *England*, is so far considered as a *British* subject, that if a ship of his is warranted to be *American* property, it is not to be deemed so: and if captured the owner cannot recover

THIS was an action of assumpsit on a policy of insurance, dated the 29th of *December*, 1800, and had been effected by the plaintiff on the freight of the ship ———, on a voyage from *Liverpool* to *Naples*.

The ship was warranted to be *American* property.

She was captured by the *French* in the course of her voyage; and the loss stated in the declaration was by capture.

The action was defended by the underwriters, on the ground that the warranty had not been complied with, the ship not coming under the description of *American* property.

The facts of the case were, that the plaintiff was a native of *America*, where he had lived; but had commanded a vessel employed in the trade between that country and *England* for some length of time: That in the year 1797, he married an *Englishwoman*, by whom he had a family: That he had, at the time of his marriage, taken a house in *Liverpool*, in which his family resided, and he himself, when at home: That since his marriage, he had been a voyage or two to *America*, from whence he had returned, and lived with his family at *Liverpool*, but that for the last

* This action was tried at the sittings after Trinity Term, 1801, and, by mistake, omitted in the cases of that term.

year

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[*109]

year he had not been out of *England*: That in the latter end of the *year 1800, he had purchased the vessel in question, which was an *American*-built vessel, from her former owner, who was also an *American*. The vessel was purchased in *America*, and brought from thence to *England*, with all the regular papers, registers, and documents required for a ship belonging to that nation: And, lastly, that the plaintiff had not become domiciled in this country, except by the residence above stated; and had it in contemplation to go with his family to *America*, to reside there in future.

Upon this evidence the plaintiff's counsel contended, that the vessel was to be deemed, to all intents and purposes, an *American* vessel: That the owner was an *American* born, not domiciled in this country; but residing here but for a short period, for the purpose of trade, and having it in settled contemplation to return. That a merely temporary residence of a foreigner, as it conferred no privileges, should carry with it no disadvantages; the plaintiff was still an *American* subject, though resident in *England*, to which he owed but the temporary allegiance which such residence required.

It was answered by the defendant's counsel, that the warranty in this case was to be strictly complied with; and the question was, whether this vessel could, under the circumstances of the case, be deemed to be *American* property? The ship had been freighted from *Liverpool* for the voyage, by a merchant residing there, and the proceeds of the voyage were to be brought back to
[110] *England*; and she was to be benefitted by them: That powers, therefore, at war with *Great Britain*, had a right to consider the ship and property on board as *British*, whether the property really belonged to a subject of *America*, or not: That as to the plaintiff's intention to return, that could have no influence on the case, as it would scarcely be called matter of evidence.

Lord KENYON said, That he was of opinion the plaintiff was not entitled to recover. That where a policy was underwritten, the underwriters had a right to expect the most strict adherence to the letter of the warranty: This ship was warranted to be *American* property;—Was she so in fact? The only matter constituting her such was, that she was the property of a person who was in fact born in *America*. This question depended, in a great degree, on the law of nations. Persons resident in a country carrying on trade, by which both they and the country were benefitted, were to be considered as the subjects of that country, and were

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were considered so by the law of nations, at least so far as by that law to subject their property to capture by a country at war with that in which they lived: That in the great cases respecting the *St. Eustatia* captures, in an appeal at the Cockpit, by Lord CAMDEN, assisted by some of the greatest lawyers of this country, the law had been so considered, and had so been acted upon; and in the more recent case of the *Argonaut*; a native of this country, by being domiciled in *America*, was held to be by that means entitled to all the privileges of an *American* subject.

The plaintiff was nonsuited. [111]

The *Attorney-General*, *Erskine*, *Park*, and *Gazelee* for the plaintiff.

Garrow and *Gibbs* for the defendant.

The KING *v.* SMITH et alt.

Where a place has been used as a public fair or market for above twenty years, to which persons have resorted for the purpose of there exposing articles to sale, they shall not be liable to be indicted for a nuisance, as for obstructing the highway, if fairly engaged in using the place as a fair or market.

THIS was an indictment against the defendants for a nuisance, in obstructing the highway at a place called *Sparrow Corner*, in the parish of *St. Botolph*, in the city of *London*, by putting in it divers bags of clothes, &c. whereby the way was obstructed.

Four of the defendants pleaded not guilty.

The others justified, that in the place where, &c. was a certain place or market, called *Rag-Fair*, from time whereof the memory of man was not to the contrary; and so justified the putting the bags there, for the purpose of sale.

The replication denied that it was such a fair, or market.

Gibbs, in stating the case on the part of the prosecution, said, That the place had been used for a market, for the sale of clothes, &c. for about twenty-five years, but that that was an encroachment, and never acquiesced in.

Lord ELLENBOROUGH interrupted him, and said, That upon that statement, it appeared to him the indictment could not be maintained against those who had pleaded not guilty, as it appeared to have been used as a fair or market for that time: That after twenty years' acquiescence, and it appearing to all the world that there was a fair or market held there, he could not hold a man to be criminal who came there under the belief, that it was such a fair or market legally instituted. If the fair or market was not a legal one, the party might be proceeded against for usurping the franchise; but it being enjoyed as a public fair or market for twenty years, that, in his opinion, was an answer to the criminal [112]

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The KING v. SMITH et alt.

minal part of the charge, if the market had been used without interruption.

His lordship therefore directed an acquittal.

Gibbs and *Dampier* for the plaintiff.

Erskine and *Espinasse* for the defendant.

SITTINGS AFTER TERM IN THE COMMON PLEAS, AT GUILDHALL.

CHEYNE *v.* KOOPS.

In an action for a debt due by several partners, one of them who has not been joined in the action, cannot be made a witness for the defendant by any release from him.

ASSUMPSIT for goods sold and delivered to the defendant, trading under the firm of the *Neckinger*-Mill Company.

Plea of non-assumpsit and special notice, that the several supposed promises and undertakings were with one *Barnard Evans*; and that *Evans* was indebted to the defendant in more money than the amount of the plaintiff's demand.

To prove the set-off, and the nature of the dealing of the defendant with *Evans*, the defendant's counsel called a witness of the name of *Carpenter*.

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He was asked on his *voire dire*, Whether he was not a partner in the concern of the *Neckinger*-Mill Company? He answered, That he had a small share in it. He was then objected to.

To restore him to competency, the counsel for the defendant offered to give him a release; and he offered to release the defendant.

The plaintiff's counsel contended, That this would not be sufficient: That the plaintiff had a right to have him as a security for his costs, he being proved to be a partner, to which, by defeating the present action, he would not be subjected; and that, therefore, without a release from the plaintiff, he could not be admitted.

The defendant's counsel contended, that, under the present record, no recovery against the defendant could affect the witness, as the plaintiff could never call upon him: That he could only be liable to contribution to *Koops*, in case *Koops* was called upon to pay under this verdict; if, therefore, *Koops* released him from any demand on account of that contribution, he released him from the only way in which he could be interested.

Lord ALVANLEY said, He thought the witness was not admissible; that there was an interest in the witness, which could not be

be released by the mode proposed: The partners were all bound in equity to contribute; and though, if an action *at law was brought against the witness, he could plead the recovery in the present action, which would be a bar at law; yet if *Koops*, the defendant, was dead, or insolvent, the present plaintiff would have a right, by a bill in equity, to compel all the partners to contribute; and the witness, of course, be subjected to his share.

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His Lordship, however, proposed to allow the witness to be released by the defendant, and a verdict taken, subject to the opinion of the Court: but the defendant not being present, the release could not be given; and the

Plaintiff had a verdict.

Cockell and *Hovel* for the plaintiff.

Shepherd and *Onslow*, Serjts. for the defendant.

ON THE HOME CIRCUIT. HERTFORD, MARCH 8, 1802. CORAM HEATH, JUSTICE.

HICKS *v.* HANKIN.

Where a purchase is made by an agent, he is not a special agent if he has any discretion to exceed the sum ordered to be given by his principal; if he has such a discretion, the principal is bound by his contracts, though they exceed the sum which he is ordered by his principal to give.

THIS was an action on the case, brought to recover damages, for the breach of a special contract.

The declaration stated, That, on the 23d of *April*, 1801, in consideration, that the plaintiff, at the special instance and request of the defendant, had agreed to sell and had sold a certain quantity of brown malt, at and for the sum of 3*l.* 14*s.* *per* *quarter, for each and every quarter, to be paid by the defendant to the plaintiff at a certain time, long since past; the defendant undertook and faithfully promised to take away the said malt within a reasonable time then next following, and to pay the plaintiff the said price or sum for the same at the time so agreed upon as aforesaid.

The contract in question had been made at *Stortford* market. It was produced, and was in the following words:

"Sold Mr. *George Hankin* 320 quarters of *Hicks*'s malt, at "74 shillings.

[*115]

(Signed) "*J. Taylor*."
J. Taylor

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J. Taylor was called. He said, he was a malt-factor at *Bishops Stortford:* That he was employed by the plaintiff to sell the malt: that he had entered into the contract in question with *Joseph Hankin*, to whom he delivered a copy of the sale-note: That he had known *Joseph Hankin* for many years, who was the son of the defendant: That he had done his father's business, and made his contracts at market, the defendant being a considerable dealer in corn: That he was paid by the plaintiff, and not by the defendant.

Best, Serjt. for the defendant, objected: that the plaintiff should be nonsuited: that the statute of frauds, in order to establish a valid contract, required the note to be in writing, and signed by the parties, or their agents, lawfully authorized: that it was in evidence that *Taylor* was employed by *Hicks*, the plaintiff, by
[116] whom he was paid; he was the agent therefore of the plaintiff only, and as he only had signed the sale-note, the statute was not satisfied by such signing.

HEATH, Justice, said, It was sufficient, as *Taylor* was the agent of both parties in making the contract, and that his signing was therefore valid.

The bargain having been made by Mr. *Joseph Hankin*, the son of the defendant, the defence relied on was, that he had been acting as the agent of his father in this transaction, having been directed by him to buy at a certain limited price: That he had exceeded his authority by giving the sum in question, which was beyond that which he was authorized to give, by ten shillings a quarter; and that, of course, he being a special agent, and having exceeded his authority, his principal, the defendant, was not bound by it.

Joseph Hankin was called, and produced the instructions in writing, which he had received from the defendant; those instructions authorized him to give 64*s*. 6*d*. *per* quarter: He said he had communicated those instructions to *Taylor*, who said it must be a mistake, as malt then produced 74*s*. 6*d*.; and at that price, the contract was concluded.

On his cross-examination, he was asked, Whether, notwithstanding his instructions so delivered by his father to him, he did not consider himself at liberty to give a price beyond 64*s*. 6*d*.?

He answered, that he did.

HEATH, Justice. Though a special agent, acting under a limited authority, cannot bind his principal, if he exceeds his au-
[117] thority; such special agent must be so expressly limited as to price, and be not authorized to go beyond the limits of his autho-
rity;

rity; if he is at liberty to do so, he is not a special agent. Mr. *J. Hankin* admits he did not consider himself as bound by the direction in writing of his father; he considered himself at liberty to exceed that authority: and I am therefore of opinion, that his principal is bound.

Verdict for plaintiff.

Shepherd, Serjt., *Garrow*, and *Pooley*, for the plaintiff.

Best, Serjt., and *Lawes*, for the defendant.

AT MAIDSTONE, CORAM HOTHAM, BARON.

The KING, on the prosecution of JACKSON, *v.* JOSEPH CATOR, Esq.

March 15th.

How far comparison of hands in evidence.

THIS was an information against the defendant for a libel. The libel was contained in several letters written by the defendant to the prosecutor.

The prosecutor lay under considerable difficulty in proving that the hand-writing in which the letters were written, was that of the defendant,—it being in appearance different from his common character in writing.

To establish the fact of the libellous letters being of the defendant's hand-writing, the counsel for the prosecution produced several letters, avowedly written by the defendant; in fact, written to the prosecutor himself, in answer to letters written by the [118] prosecutor to him, and proved the fact clearly, that those letters were the defendant's hand-writing. They then proposed to call a clerk in the post-office, who held the place of inspector of franks, to prove that the hand in which the libels were written, was a feigned one; and to prove that, notwithstanding the disguise, the hand in which the libels were written, was the same with that of those letters admitted to be the defendant's hand-writing in the letters above stated.

Garrow, of counsel for the prosecution, called Mr. *Bonner*, who was deputy inspector of franks in the post-office. He first asked him, as introductory to his giving his evidence on the principal point, the following questions:—Whether, in consequence of his situation, and the duty of his office, he had occasion to inspect the character of a great number of hands-writing? He answered,

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swered, Yes.—Whether it was not part of his daily duty to look at the franks which came in, to ascertain whether they were the general hand-writing of the member whose hand they purported to be? or whether they were forgeries?—He said it was.

Whether he could discern, upon inspecting a hand-writing, whether it was the natural current hand of the person who wrote it; or whether it was an imitation of some other hand?—He said, he thought that he could easily discern whether the hand was a disguised one or not.

He was then asked, Whether he thought that he had acquired a knowledge, by which, from comparing a hand-writing acknow-
[119] ledged to be the party's hand-writing, with another, he could say that they were the same?—He answered, That he had made that part of his study.

He was then desired to look at the libels, and say, whether they were the genuine hand-writing of the person who wrote them?—He said, he had no doubt they were written in a disguised hand; and that if a paper, so characterised, should come before him, in his office of inspector of franks, he should act upon it as not genuine.

He was then desired to look at the letters, which were proved to be the defendant's hand-writing, and to say, if the libels were the same hand-writing?

This was objected to by the defendant's counsel.

The *Attorney-General*. I understand the object of this evidence to be, to shew, by this witness, who has never seen Mr. *Cator* write, not only that these papers are written in a disguised hand, but that they are actually the hand-writing of Mr. *Joseph Cator*. To this evidence I object; and I do contend, that, from the moment in which justice was first administered in this country to the hour in which I am now speaking, such evidence never did enter into the head of man to tender, according to any records of the proceedings of courts of justice that have yet been heard of. I suffered the examination to proceed to this extent; which is the only extent to which, by any authority (and that authority to a certain degree questionable) it has ever been recognized in any civil case. When I say recognized, I must allude, first, to the last case that was tried before Mr. Justice Le Blanc, *Forster* v.
[120] *Mellish*; in which that evidence was offered; and then the learned Judge said, it was impossible, for a moment to think, that that evidence, in the extent which it was offered, was evidence which ought to be submitted to a jury. But from a confirmed report of the

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the case of *Revett* v. *Braham*, where that which is admissible has been mixed with that which is inadmissible, and where the inadmissible part has since been repudiated by my Lord KENYON (but from the want of having the written case, I have it not now in my hand to produce that, in which that noble and learned Judge did repudiate it) Mr. Justice LE BLANC did suffer that evidence to be given. I ought to have given that learned Judge credit for discriminating between the parts of that case of *Revett* v. *Braham*, to what extent it was considered as admissible: It was the case of a will, signed by a person who was supposed incapable of putting a signature to a will; who was supposed to have been incapable of writing in character,—as that will appeared to be written in uniform character. Mr. *Garrow* and myself were in that case; where, for the first time, this novelty was introduced into the jurisprudence of the country: it was the first time, in a case either civil or criminal, in which that species of evidence was received. The evidence that was offered was of this sort: To one extent admissible; but to the extent to which it was offered in the case of *Forster* and *Mellish*, inadmissible. You may call persons of skill to ascertain whether a hand-writing, written at broken intervals, is the genuine hand-writing of any individual; or [121] whether it is written at interrupted strokes, like the writing of a person attempting to imitate the hand of another. Mr. Justice BULLER's only observation was, and probably the idea of admitting the evidence at all to that extent, originated with that learned Judge (for whom no man has a higher respect than I have, and, therefore, it will not be supposed that I mean an insinuation that he wished to introduce novelties;) but certainly his idea was to go to the very extent of the law, and adopt something which had not occurred to the wisdom of others who had gone before him. I do not mean any disparagement; but certainly that was the bent of his mind, and the way in which he thought the evidence admissible, was as the evidence of a person of skill, in a particular act. This will be seen by adverting to what he says: He says, Such evidence was admitted in the case of *Wells* Harbour. Now what was that case? It was a case that required the opinion of men of skill. Upon the particular subject, men of science were called, to shew the effect of the machine in removing obstructions in that harbour; and we are all men of science in writing,—we are all judges of writing; but as a question of skill, so far as it is a mere question of skill, whether it is a genuine or a feigned hand? I will not quarrel

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with it; but when it is carried to this extent, it then becomes dangerous; and I shall think my labours upon this point well bestowed, as an advocate, who is in some respect in the exercise of his duty, entrusted with the lives and property of his Majesty's subjects, to see that evidence so dangerous is not admitted; which never was, in the worst of times, at any period that ever disgraced this country, offered in a court of justice. Now let us refer to what has occurred in what I am allowed to call the worst of times, the case of *Algernon Sydney* and the seven Bishops. In the case of the seven Bishops: an illustrious name, fit to adorn and improve the bench of any country, Mr. Just. Powell, formed one of the bench in that case. They had not then got the length of proving the similitude of hands by persons who had never seen the party write. Two out of the four Judges refused such evidence in that case. In the trial of Col. *Sydney*. which I think a disgraceful one (for there was no overt act of publication in his own closet) how was his hand-writing proved? By persons who had all of them seen him write,—by persons having the legitimate means of knowledge now received in courts of law. In the trial of the seven Bishops, witnesses were called to prove the hand-writing of the then Archbishop of *Canterbury*, and several others; and the question arose with respect to the then Bishop of *Chichester*; and see what a tenderness there was even in those times, when it was supposed, so much of the security of the realm depended upon it, that after that trial the Chief Justice was dismissed from his situation, and his name handed down to infamy; I speak of Lord Chief Justice Jeffreys. I mention this only to shew with what tenderness the court watched, even in those times, over the lives, property, and characters of his
[123] Majesty's subjects. Such evidence was rejected by Mr. Justice Powell and Mr. Justice Holloway. Mr. Justice Holloway is a person on whom no particular praise attaches; but it is highly creditable to him that he could so stand out in such times. Mr. Justice Powell says, "Mr. Solicitor, I think you have not sufficiently proved this paper to be subscribed by my Lords the Bishops; you cannot read it." That was proved by persons with whom they had corresponded.—Mr. Solicitor says, 'Not to read it, Sir?'—Mr. Justice Powell. "No, not read it; it is too slender a proof.—I grant you, in civil actions, a slender proof is sufficient to make out a man's hand, by a letter to a tradesman, or a correspondent, or the like; but in criminal causes, such as this, if such a proof be allowed, Where is the safety

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safety of your life? or any man's life here?" Then the Lord Chief Justice, with his usual delicacy of manners, says, 'I tell you what I say to it, I think there is proof enough to have it read; and I am not afraid nor ashamed to say it; for I know I speak with the law, say what you will of criminal cases, and the danger of people's lives, there would be more danger to the government if such proofs were not allowed to be good.'—Mr. Justice Powell says, "I think there is no danger to the government at all, in requiring good proof against offenders."—Mr. Justice Holloway says, "I think, as this case is, there ought to be a more strong proof; for certainly the proof ought to be stronger and more certain in criminal than in civil matters. In civil matters we go upon slight proof, such as the comparison of hands, for proving a deed or a witness's name: and a very [124] small proof will induce us to read it; but in criminal matters we ought to be more strict, and require positive and substantial proof; that it is fitting for us to have in such a case as this: and without better proof, I think it ought not to be read." Lord Chief Justice says, 'You must go on to some other proof; for the court is divided in opinion about this proof.' So even at that time, about proof of hand-writing, by persons never having seen the party write, they drew a distinction, which I am not now going to sustain, any further than to shew the extreme nicety and vigilance that was observed in criminal cases; and that such evidence never was admitted in any case, civil or criminal, till of late years. In the case of *Algernon Sydney*, the only comparison of hands was a comparison of the hand-writing lodged in the memory of witnesses. It was there held by the court, that it was not sufficient for the original foundation of an attainder; but might be well used as circumstantial evidence, if the fact be otherwise proved. There was a further circumstance, that those very papers were found in his possession; and it was particularly addressed by Sir *Robert Sawyer* to Mr. Serjt. *Pemberton*, that in that case there was possession accompanying the papers; but I am not now desiring to go the length that was gone by those Judges in the worst of times; I am only desiring not to go further than any Judge administering the criminal law of *England* has ever yet gone: and when the prosecutor's counsel produce remote evidence, drawn by the comparison of hands by a person who never saw the defendant write, I do submit, for the safety of all his Majesty's subjects, that this evidence [125] is not receiveable.

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Now let me go to that which is supposed to be the warrant for its reception. In the cause of *Revett* and *Braham*, the question was not merely, whether the witness had skill to discover whether it was a genuine or artificial hand? but it was produced for a further purpose,—To shew that these papers were the hand-writing of a person whom the witness had never seen write: not conceiving that any thing so irregular would have been produced, in the case of *Forster* v. *Mellish*, I was not so well prepared for it. Mr. Justice LE BLANC said, "Are you prepared to shew that that case has not been acquiesced under?" Not knowing of any contrary determination, I said, 'I will not, without some authority, desire your Lordship to decide in opposition to the case.' But I can now refer your Lordship to a case, which Mr. *Garrow* will recollect, for I see that he was the person who brought it forward: it is is reported in Mr. *Peake*'s *Law of Evidence*, 37 *Geo.* III. *Cary* v. *Pitt*, decided, since the case of *Revett* v. *Braham*, I think about a year: but it is certainly since. It was a case that had undergone a great deal of conversation; and, I am quite confident, that if this point should ever be resuscitated, that it never will be recognized as law to the extent that has been urged. That was a case of a bill of exchange: the defendant insisted the acceptance was a forgery; and, among other evidence, to prove the defendant's hand-writing, the plaintiff called a witness of the name of *Culson*, who [126] was an inspector of franks at the Post-office, to prove that he had frequently seen franks pass the office in the defendant's name, he being a member of Parliament; and that, from the character in which those franks were usually written, he believed this acceptance to be the defendant's hand-writing:—he had never seen the defendant write. Lord KENYON said, This is not admissible evidence. The farthest extent to which the rule had been carried, was to admit a person who had been in the habit of holding an epistolary correspondence with the parties, to prove the hand-writing, from the knowledge he acquired in the course of that correspondence. A case, reported by *Fitzgibbon*, was the first in which such evidence was admitted: that evidence was admitted on sound principles; for if where letters are sent, directed to a particular person, on particular business, an answer is received in due course, it is a fair presumption that the answer was written by the person whose hand-writing it purported to be; but the franks sent to the office might be the defendant's hand-writing, or they might be forgeries, as well as the

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the present; for no communication was had on the subject with the defendant. Mr. *Garrow* then asked the witness, Whether, having been used to detect forgeries, he could say whether this was a genuine hand-writing, or otherwise? Lord Kenyon said, He could not receive this; and observed, that though such evidence was received in *Revett* and *Braham*, he had, in his summing up to the jury, laid no stress upon it. This is a decision of my Lord Kenyon, upon recollection of what he had recently [127]
decided, with the full comprehension of the mischievous consequences that might result from it. There was another case before *Revett* and *Braham*, reported in *Peake's Nisi Prius Cases*, 20, *M'Pherson* v. *Thoytes*, where Lord Kenyon says, Comparison of hands is no evidence. If it were so, the situation of a jury who could neither write nor read, would be a strange one; for it is impossible for such a jury to compare the hand-writing. There was also another case, before Mr. Justice Yates, *Brockbard* v. *Woodlay*, there recited. There a paper was produced which was said to be the hand-writing of the deceased rector. In order to prove it to be the hand-writing of the person whose name it bore, the plaintiff's counsel offered to produce many of the returns of the spiritual courts, of the births and burials made in the time of the rector, and signed with his name; and upon comparing the hand-writings with the returns, it was said it would appear that the hand-writing was the same. But Mr. Justice Yates says, "I have no doubt to reject this evidence as not admissible: I do not know any case where comparison of hands has been allowed to be evidence at all: no trial can be decided by opinion and speculation; but by evidence, where the witness has seen the party write, and speaks to his belief of that writing, which is produced in evidence, being the party's hand-writing, that is evidence; but where it is merely opinion, on similitude of the writing collected from barely comparing them, the jury may compare them as well any body else; and any two people may think differently. In an indictment for forgery, the evi- [128]
dence of a person who has seen the party write is sufficient. The case now in question is not like a rental, terrier, or old title-deeds; those are received without evidence of hand-writing, because of the place they come from, which gives them authenticity:" and then he adopts the same proposition that was adopted before: Suppose some of the jury can neither read or write, how are they to judge of the similitude of hands? Upon the same principles, upon which this evidence was rejected by my Lord Kenyon himself, being his own recent case of *Revett*

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and *Braham* brought under his review, and upon these authorities, independent of any other, I submit this evidence is not admissible.

Mr. *Adam*, on the same side. It will be necessary to attend to the situation in which the defendant stands, it is that of a criminal trial; and we are to submit, that there is not a case, or a remnant of a case, that can warrant the receiving of this evidence. Mr. *Attorney-General* has travelled back to a distant period of time, and has contrasted most powerfully, by his own conduct, the difference between the administration of justice in those times and the present. I have one additional observation to make with respect to the trial of Colonel *Sydney*: not only the witnesses were persons who had all seen him write, they were not only acquainted with his hand-writing, and compared the character of the writing; but there stands upon the statute-book, after the revolution, an act of parliament which did away [129] even that comparison of hand, and the attainder was repealed, that it might not appear in evidence to after-ages. And, therefore, I have the sanction of the legislature for the rejection of that evidence, in *Algernon Sydney*'s noted and remarkable case, an act of parliament, which passed at a time too, when my Lord *Somers*, together with the greatest luminaries this country ever knew, assisted in the framing of that act.

I recollect perfectly in the court below, not long ago, there was a necessity of proving the hand-writing of *O'Coigley*: papers were found upon him; and the *Attorney-General* of that day never thought of proving it by a comparison of hands; but called a witness who knew the hand-writing of the party: and that is the constant course. Now how does the case stand here? It stands shortly thus: Here is a paper produced for the purpose of convicting Mr. *Cator* of a libel. That paper is admitted to be a feigned and disguised hand; and witnesses are to be called to shew this feigned and disguised hand is the hand-writing of Mr. *Joseph Cator*. Who have they called? An inspector of franks, who takes upon him to have skill in that particular subject; and that brings it to this point: What is the principle upon which every case o that sort is decided? It must be by analogy. For instance, in the case of *Wells* Harbour, or any thing relating to hydrostatics or mechanism, a person is called to speak to the particular thing in which he has skill. But why? Because he speaks to the general laws of nature, which are in- [130] variable, in all cases and in all situations; and whether the Court hears evidence with respect to the effect of a body of water upon a bridge, or upon a dock, or upon a lock, or any other place, the

immutable laws of nature equally apply. Then the jury have before them, what? They have not a butcher to talk of a gun-shot wound; because he is not to be credited upon the point to which he is called: they have not a coal-heaver to speak to the pressure of water upon a bridge; because he is not capable of speaking to that point; but witnesses are called to give evidence arising from their knowledge of the particular subject. On the other side, they do what? They call Mr. *Bonner*, an artist, who goes to the extent of proving it to be a feigned hand, and that it is not written like an original hand; but the moment he comes to talk of a comparison of hand-writing, he ceases to have his judgment depend upon any thing like a general principle; because it must depend upon his knowledge of the particular case: It must depend upon the knowledge of the particular hand-writing, and not upon his skill in the comparison of the hand-writing of Mr. *Cator* and the hand-writing of these letters; because, he says, he knows nothing of his hand-writing, and has not seen him write. It is upon that principle that *Revett* and *Braham* was decided: It is upon that principle that *Carey* and *Pitt* was decided: they proved it to be a disguised hand. Lord KENYON there stopped them, and said, you shall not go further to that extent. He was speaking of an artist; but beyond that, he was not permitted to go. I am not aware of any other case than those which have been referred to by Mr. *Attorney-General*, except a very recent case of Mrs. *Robinson*'s will, which has been three times tried. At the second trial of that cause, my Lord KENYON intimated a clear and distinct opinion, that comparison of hands by a person who had not seen the party write, was not evidence. When that cause came to be tried lately before Lord ALVANLEY, we were of opinion there was perfectly sufficient evidence to go to the jury without it; and therefore, we did not tender it. I submit, therefore, that this question has been decided in *Carey* v. *Pitt*. The doctrine was loosely laid down in *Revett* and *Braham*; and still confirmed by Lord KENYON's intimation in the case of Mrs. *Robinson*'s will, in the Court of King's Bench. I submit, therefore, upon clear and sound principles, that this evidence is inadmissible, as applicable to a criminal case; otherwise it would be opening a door to conviction, which it would be impossible for the wisdom of ages afterwards to shut. We do not agitate this question to prevent fair evidence from going before the jury, but we are anxious that nothing but legal evidence shall come before them.

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Garrow, for the prosecution. In this case the defendant's

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counsel have observed, that we are not in a civil case; in which point of view I would also desire the question to be considered, as in the case of *Forster* and *Mellish*, by tendering a bill of exceptions, in case you should be induced, upon pressing arguments, to reject this evidence; here there can be no revision of it, however tainted the defendant may be; it is past redemption, and he goes quit for ever in consequence of an error in judgment;—
[132] not so in receiving the evidence under the revision of the other Judges. To be sure, it is not a pleasant thing to have it understood that strong facts have come out, tending to shew that persons have been guilty of scandalous libels; but such persons must take their chance in standing in that condition; and there will be no failure of justice, for the Court will say the learned Judge had been surprised at *Nisi Prius*; and then Mr. *Cator* comes down an entire new man at the next assizes. Upon the other evidence, excluding the evidence of men of science, I am much obliged to my learned friends, though they will not thank me for the obligation, but I am obliged to them for *Algernon Sydney*'s case; about which my learned friends do not agree; because Mr. *Attorney General* says, there was evidence competent to be considered, with respect to the paper found upon him. Mr. *Adam*, however, falls foul of this, and refers to the statute. That which is called comparison of hand-writing, is here not comparison of hand-writing: that is what I wish to have written in large letters. Upon the whole of this argument, I am not contending for comparison of hand-writing, in the sense in which *Sydney's* case speaks of comparison of hand-writing; in which *Revett* and *Braham* speaks of comparison of hand-writing; in which Mr. Justice Le Blanc speaks of comparison of hand-writing; or in which, in *Carey* and *Pitt*, my Lord Kenyon speaks of a comparison of hand-writing; but the gentlemen are giving me a term, upon the foundation of which this evidence is to be rejected. I
[133] am asking the witness, who has acquired a greater and better knowledge of hand-writing than other men, to refer to the knowledge generated and founded in his mind, and then say, Does he believe those papers to be the hand-writing of the man whose character of writing he has acquired, not by comparison, but by being referred to a standard, by reference to an indisputable standard, which is the hand-writing of Mr. *Cator*; and by reference to which, as a man of science, he may give his opinion? What was done in the case of *Wells* Harbour? Why, they had not seen the way in which the hydraulic machine was put together; but they had studied mechanics, and by reference to their scientific knowledge, they gave their opinion: which opinion, my

learned friend says, is competent to be received. But let us come a little to the cases that have been mentioned: With respect to the case of *Revett* and *Braham*, I know what my learned friend meant very well: he knew perfectly well the great extent of mind of Mr. Justice BULLER; he supposes he had a sort of itch for carrying things to the extreme; but, if he was that species of character, he was not driving alone; he had Lord KENYON to assist him; and he had also Mr. Justice ASHHURST and Mr. Justice GROSE. Here, therefore, is the Court of King's Bench, upon deliberate argument, sitting at bar, receiving precisely this testimony; not receiving comparison of hand-writing, for Lord KENYON would have rejected that. I come now then to see what comparison of hand-writing is. I call somebody out of the crowd: I shew him a paper of Mr. *Cator*'s hand-writing, and [134] say, that is a paper of Mr. *Cator*'s hand-writing, he not being a man of skill: then I shew him the libel, and do the same by the jury: half of them may think it is Mr. *Cator*'s hand-writing, and half may think it is not; but here I am bringing a man of science, a man of skill in the subject. What is the knowledge of Mr. *Jackson?* A note written to him.—What is the knowledge of Mr. *Day?* He has received orders and a letter from him, by which he has got a knowledge of his hand-writing; but if Mr. *Day* had had no skill in hand-writing, and I had shewn him that by which I had not made a standard by any legitimate evidence, his opinion would have no weight. But let us come to the case upon which my learned friend relies, the case of the seven Bishops, where there were two Judges against two; and they rejected the testimony, upon the ground that they could not receive this comparison of hand-writing; and whenever I am found offering comparison of hand-writing, I desire it may be rejected. The case of *Revett* and *Braham* was most deliberately considered. I own fairly, I was one of those who had my doubts whether the second branch would be resisted. However, though counsel resisted, the Court had no difficulty in receiving it; but that is a question which cannot be treated at *Nisi Prius* flippantly; it was a new trial of an ejectment; Mr. Serjt. *Shepherd*, and I, and Mr. *Mingay*, were on the same side. There had been a verdict adverse to *Revett*: there was a supposed difficulty; but that did not conclude the party. Might he not have brought [135] another action, and tried it at the bar in the Exchequer? Might he not have tried it in the Common Pleas? I do not wonder that they are a little sore about it, as, I take it, they are by their overt acts; for my client is in possession of a considerable estate in consequence of it. It does so happen, that I was counsel in

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that case of *Carey* and *Pitt*: it was an action brought upon a clear forgery of the name of Mr. *William Morton Pitt*; and no cases can be less alike than *Revett* and *Braham* and *Carey* and *Pitt*. I was for the plaintiff; and I could not pick up amongst all mankind, one who had ever seen Mr. *Pitt* write, to say it was Mr. *Pitt*'s hand-writing; it was sent to the Postmaster; not to compare by a standard, proved by witnesses to be the hand-writing of Mr. *Pitt*, and then desiring the person from that Post-office to compare it; but I called a man from the Post-office to prove that letters of that character had passed as genuine franks; but the court could not receive such evidence: it was impossible. But does this touch *Revett* and *Braham*? Does this touch the case I have here? I could do nothing in this case without establishing my standard, without having well proved the hand-writing of Mr. *Cator*; but the moment I have done that, and put them into the hand of a person of skill, I can ask, Is that, from your knowledge of the subject, the same hand-writing?

I have practised a good deal in criminal courts, and before some of the first Judges that ever adorned any country; and I shall never forget how many useful lessons I have learned from [136] that excellent and valuable Judge, who is now no more. Every body knows I speak of Mr. Justice BULLER. Was there any man ever went more slowly and cautiously to his conclusions than Mr. Justice BULLER? And yet, at the hazard of Mr. *Attorney-General* contradicting me, in reply, I say this, That in every case there is no distinction between the rules of law, as they apply to criminal cases, and as they apply to civil cases. I invite any body who has an appetite, to stand forward and contradict me. I say, in the principles in which causes are to be tried, there is no distinction between an action for goods sold and delivered, an action upon a bill of exchange, and on an indictment for a capital felony; but, in favour of life, Judges refer it to juries to look at the evidence with more caution, and endeavour to take care they are not imposed upon. And how can it be otherwise? What security would there be, if there was one rule of law in an action for 20 or 30,000*l.* against Mr. *Cator*, and a different rule of law, if it was on a bill for forgery, exhibited in the court below? I am not contending for a comparison of hand-writing; I am referring to the skill and judgment of a person, with respect to whom the jury are to judge. It may be contrasted with the evidence of others more or less knowing upon the subject: Suppose a person was called who had not recently seen the party write. Suppose a schoolmaster had a boy who had never got more than the length of writing his name, and could never read it: after-

wards the schoolmaster would say, I could never get this fellow any forwarder; he always wrote his name in this manner: he has not *sagacity enough to alter his character. It depends upon figures, characters, and a thousand other things; but he could not speak like a man of science, such as the witness I have offered. I will again also remind your Lordship, that if you should be induced to say you will not receive this evidence, you close the door upon inquiry in future, and shut out the administration of justice upon this most important point. [*137]

Mr. Serjeant *Best*, on the same side. After this argument has been so fully gone into by Mr. *Garrow*, I shall make but few observations; and if the effect of your Lordship's judgment should be against us, I trust your Lordship will take such measures, that the highest court in this country, out of which this record comes, shall have an opportunity of settling this point; which is not only to affect the character of the person now before the Court, but to affect a most important principle. My learned friend has argued this point: he says, It would not only affect the character, but it would be attended with great anxiety on the part of Mr. *Cator*; but look at the extent to which that answer may be carried: it is an inconvenience which every man must feel who is placed in that situation. If that argument were to have any effect, no man could be prosecuted unless there was a certainty of conviction. It is at all times sufficient, if there is a probable cause.

This objection has arisen from the circumstance of its being termed a comparison of hand-writing; but it appears to me to be nothing like a comparison of hand-writing. I will not give any idea of my own of comparison of hand-writing; but I will [138]
give it in the words of the case alluded to by Mr. *Attorney-General*, *M'Pherson* v. *Thoytes*. Upon what principle does the noble and learned Judge, in that case, speak of comparison of hand-writing? There was no evidence offered by any witness who was skilled in the subject; but here is a witness who states upon his oath, that he is competent to decide upon the question to which he is called. That circumstance appears to me to be the principle upon which, in all these cases, comparison of hand-writing ought or ought not to be received. That was a case of simple comparison of hand-writing, without producing the standard to which it was to be applied. In the case of *Carey* and *Pitt*, when the person from the Post-office was called to look at the hand-writing of Mr. *Pitt*, if there had been evidence laid before the court that another paper was the hand-writing of Mr. *Pitt*, I say, upon the authority of *Revett* and *Braham*, that evidence

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should have been received. Why was it rejected? Because, in that case there was no evidence to shew, that the paper the witness was to compare it with, was the hand-writing of Mr. *Pitt*; therefore, my learned friend might have gone on comparing *ad infinitum*; there being no evidence that *that* with which he had compared it, was the hand-writing of Mr. *Pitt*. Look then at the case of *Revett* and *Braham*: Is that a case at *Nisi Prius?* or is it the solemn determination of the whole Court of King's Bench sitting at bar? That case, therefore, is the authority of
[139] the whole Court, and is entitled to all the credit of a solemn determination.

There is one argument at which I am astonished, when I hear from whence that argument comes: The *Attorney-General* says, That if the evidence that was offered in *Algernon Sydney*'s case had been offered in a civil case, he would not say it ought not to have been received. I am not aware of any such distinction; and it will be found to be solemnly determined in the *Attorney-General* and *Eden*, in *Douglas*'s *Reports*, that there is no distinction whatever between criminal and civil cases; and if we look at the nature of the law of evidence, we shall see there can be no such distinction. In that case it was solemnly determined by the Court of Exchequer, that there was no distinction whatever beween civil and criminal cases, as to the matter of evidence in point of principle. It is quite impossible there should be any such distinction. The rules of evidence are rules of common sense. They must obtain everywhere: whether we are sitting in a court of justice in this country, or any other; whether we are sitting to decide upon the life of a man, or whether we are sitting to decide upon his property, those principles, which are common sense and common justice, must apply equally to the one case as the other. Mr. *Adam* has attempted to distinguish this case from *Revett* and *Braham*: he says, *Revett* and *Braham* is distinguishable from the case of persons coming to speak upon matters of science. I confess I can see no such distinction; and I think he is not accurate in the manner in which he has stated it. Those
[140] persons are speaking upon the law of nature; and if ever there was a case in which this species of evidence ought to be received, I think this case requires it. To prove hand-writing in common cases is easy; but when extraordinary art is made use of to conceal the real hand-writing, extraordinary art must be used for the purpose of detecting it; and, therefore, in this particular transaction, it is undoubtedly necessary, where extraordinary art has been made use of for the purpose of concealing the hand-writing, to produce the evidence of persons of skill to detect it. I submit,

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therefore, under the authority of *Revett* and *Braham*, which has not yet been overturned, and I trust never will be overturned; because it seems to be founded upon the principles which pervade the whole system of evidence, that this is evidence which ought to be received.

The *Attorney-General* in reply. Mr. *Garrow*, and the other learned gentlemen contend, that they are not offering evidence of comparison of hands. I defy any person conversant with the plainest terms that occur in our vocabulary, to say they are contending for any thing short of comparison. What is it they contend for? They contend, that *that* paper which the gentleman in the box has in his hand, is the same character with the standard; but the standard itself remains to be established in his mind, who is to decide on it. It is not a question in the cause till the finding of the jury. It is *pro tempore* proved; but is there any admitted standard? There was no such pretence; nor was there, in those cases, any incontestible standard.

My learned friends say, if this evidence is received improperly, [141]
it may be reviewed; a new trial moved for; and it may ultimately be set right. In the mean time, has not Mr. *Cator* the infamy of conviction saddled upon him? In the mean time, has he not tacked to that improper rule of law the opinion of twelve men, whose opinion may be warped upon that supposition? In a civil case, if there is an equivocal and doubtful proposition, there are greater and more convenient means of setting it right than in a criminal case. The stake in which the parties are interested is not the same: in the one case, life, fortune, and fame are at stake; whereas property may suffer no inconvenience; and I submit, with great confidence, that, in point of convenience in a criminal case, a Judge will not, for the first time, adopt any rule of law which has not been sanctioned by adoption in causes civil and criminal. I am not disposed to thwart, either with a view to this cause or any other, the course of justice. I will not contend to the extent I am supposed to be contending; I will not contend that, in its full extent, the rule of criminal and civil justice is different; but I contend this, which is marked upon the moral mind and understanding of mankind, that in proportion to the magnitude of the offence, there will be a greater or less inclination in the mind of the Judge to receive evidence, if it is doubtful. The question therefore is, Is this a rule of law, so established in our courts, that the Judge, administering the criminal justice of the country, must adopt it? Though there have been persons of skill to collate franks, who have existed in the country for many [142]

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years; and though it may be important to establish hand-writing by their means, it never was adopted till the case of *Revett* and *Braham*; and I do not believe we shall attain much legal excellence by the introduction of novelties in our practice in the best of times. Then I am not for introducing new rules. I say, that neither in civil or criminal cases, before *Revett* and *Braham*, was it ever suggested; and that noble and enlightened Judge, who had certainly admitted evidence to a certain extent upon the score of skill, repudiates that case, as I stated before, in the case of *Carey* and *Pitt*. Nothing can be said to be unquestionable evidence, while the whole is in agitation before the Judge and the jury; and, therefore, there being no standard, to which both the parties have acceded, it is still a comparison of hands; and to that whole extent does it go.

I recollect a case upon the northern circuit, of which I had the conducting, and which affected the life of the party; whose life was actually forfeited. In that case evidence of similarity of hands was proposed to me; and I was of opinion, it was not evidence to be received in a criminal case. I will state the circumstances of that particular case:—A person had robbed the house of a poor man, with whom he was most intimately acquainted. The person whose house was robbed, had discovered the robbery, and suspected the robber. It occurred to the wicked mind of this person who is suspected, to inclose in a letter a poisoned pill, with directions that he should take that pill; and that pill would enable

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him to discover who was the robber; and stating, that about an hour after he had taken it, he would see a man ride by, and that was the man that had robbed him. The poor man took the pill; and, in the course of half an hour, the pains came on, and in a short time he expired. His body was afterwards opened; and upon its being opened, it turned out to be arsenic; and some particles of the pill adhered to the letter, by which it was ascertained to be arsenic. Now see the infinite importance of ascertaining, by other circumstances, who was the writer of this letter. I do not know whether it was written under any particular circumstances of disguise; but I called persons who knew the hand-writing, who had been at school with him, and who knew his character of hand: I had letters for the purpose of comparison, at all periods of his life; but, in the exercise of my judgment, I thought it was not evidence fit to introduce, and sought for confirmation of the hand-writing. I considered life was at stake. It might be that some enemy had done this; and, therefore, I sought for confirmatory sources of evidence. I found a man going to a place very far

distant, in the habit which he usually wore, and recognised by another man, who saw him go in the same dress to the Post-office at *Rippon*, throw a letter in and run away. With the addition of this evidence to that of persons who had seen him write, he was convicted.

In the case of *Revett* v. *Braham*, which I consider as repudiated authority, it has been said; why did we not bring another ejectment, which is frequently done? Because it came out that this woman, even if she had written it, was so entirely under the controul of the person who made the will, that we know it would be bad, upon the score of controul. For this man, in order to have a dominion over her spirit, had hired people to fire guns near her, and throw her into trepidation and alarm; but my Lord KENYON repudiates this authority, and would not receive the same evidence when it was afterwards tendered. Another learned counsel talks about superscription; but was it ever considered that a letter is evidence against a man because of the address and the superscription? All that we contend for upon that is, where the party answers it, orders are given, goods are sent accordingly, received, and paid for: all this is a recognition that the party, whose name is at the bottom of the order, received the goods which he ordered, by the fact of payment. [144]

HOTHAM, Baron. This case has been argued very fully; and I have spent three weeks upon thinking of the question. I certainly cannot receive more information than I have now received; and it is my duty, such as my opinion is, to give it fairly and frankly. I perfectly agree with the counsel for the prosecution, that there is no difference, in point of evidence, whether the case be a criminal or civil case; the same rules must apply to both: at the same time it has been stated, that one is more disposed to resist, and more cautious in receiving evidence, in a case where the party has much at stake; as in favour of life. What is the evidence here? Two persons have been called, who, having looked at these libels, have spoken, without any doubt, of their being the hand-writing of the party accused. As far as that goes, there is no objection to it. Then comes the inspector of franks, from the Post-office; he has these libels put into his hands. Now, I do not know how that gentleman could speak to the hand-writing, unless he could say he had seen the party write, or unless he had been in the habit of correspondence with him, excepting that he is called to speak as a man of science to an abstract question. In that light he has been called, and his evidence has been admitted. He [145]

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is shewn these papers; and he is asked to look at them, and, without inquiring who wrote them, or for what purpose. He is asked, "From your knowledge of hand-writing in general, do you believe that writing to be a natural or fictitious hand?" His science, his knowledge, his habits, all entitle him to say, I am confident it is a feigned hand. To that there is no objection; and so far as that goes, I see no reason for rejecting that evidence.

Then comes the next and important point. It is said to him, "Now look at this paper, and tell me, whether the same hand wrote both?" Why, one cannot help seeing, evidently, what must be the consequence:—I cannot conceive there is any thing in the idea of a comparison of hands, if this is not to be considered as comparison of hands. The witness says, I never saw him write in my life. Why then, I collect all my knowledge of his being the author of this, by comparing the same hand with
[146] that which other witnesses have proved to be a natural hand: by looking at the two, he draws his conclusion. It seems to me, therefore, directly and completely a comparison of hand. This question seems to have been solemnly decided; but when I see the same noble and learned Judge repenting of what he had suffered in the former case, and expressly saying he could not receive such evidence; and observing, that though such evidence was received in *Revett* and *Braham*, he had, in his summing up to the jury, laid no stress upon it: this being the case, I cannot consider it so adjudged, but that I may exercise my own judgment in rejecting it.

The prosecutor produced other evidence, and the defendant was found guilty.

Garrow, *Best*, Serjeant, *Marryat*, and *Reynolds* for the prosecution.

The *Attorney-General*, *Adam*, *Const*, and *Impey* for the defendant.

Vide ante, Garrels *v.* Alexander.

END OF PART I.—VOL. IV.

G. WOODFALL, PRINTER, ANGEL COURT, SKINNER STREET, LONDON.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

KING'S BENCH,

EASTER TERM, 42 GEORGE III. 1802.

SECOND SITTINGS IN TERM AT WESTMINSTER.

BLAKE, Executor of DALE, *v.* LAWRENCE.

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Under a particular of plaintiff's demand stating that the action was brought to recover the amount of a note of hand, interest on it is recoverable. When a note is payable by instalments, and on failure of payment of any instalment, the whole is to become due; the interest is to be calculated on the whole sum remaining unpaid, on default of any instalment, and not on the respective instalments at the respective times when they would become payable.

ASSUMPSIT on a promissory note, against the defendant, the maker. It was dated *March* 1801, payable to the testatrix by instalments of 10*l.* every three months; and in default of payment of any instalment, the whole was to be payable immediately.

Plea of the general issue, and notice of set-off.

The first instalment was paid when it became due, being the *June* following the date of the note; after which default was made.

The defendant's set-off consisted of a bill of exchange of the testatrix, upon which interest for a *considerable time was due, and of other articles; as goods sold, &c.

The amount of the bill, and the interest due on it, with the other articles charged in the defendant's set-off, covered the amount of the plaintiff's demand on the note itself, exclusive of any interest which was due on it.

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The particular of the plaintiff's demand, given in under a judge's order, was as follows:—

"This action is brought to recover the amount of a promis-"sory note, for the sum of one hundred pounds of the defendant, "and one *Whitby*.

100*l*. *A. B.* plaintiff's attorney."

The plaintiff's counsel proved the note made by the defendant; and then contended, that they were entitled to a verdict to the amount of the note, and the whole of the interest from the time when default was made in payment of the second instalment. This became important, as otherwise the defendant's set-off covered the whole amount of the note itself.

It was answered by *Erskine,* of counsel for the defendant,

First, That the plaintiff should be bound by his particular; in which he went for the amount of the note only, and did not claim interest.

Secondly, That even was the plaintiff entitled to interest, the note being payable by instalments, he could go for interest, not on the whole amount of the note, from the first default in payment; but on the several instalments, from the time when they would become respectively payable.

[149] Lord ELLENBOROUGH. By the particular, as delivered by the plaintiff's attorney, the defendant has notice of the amount of the note being claimed by the action, that is the principal; and though the interest is not claimed *eo nomine* by the particular, I am of opinion the plaintiff may recover it, as arising out of the principal so demanded by the particular.

With respect to the amount of the interest to be recovered, it is true the note is payable by instalments; but on default of payment of any instalment, the whole amount of the note becomes payable: there is therefore no severance as to time with respect to the debts becoming payable; by the first default, the whole becomes one debt; and from that time interest becomes payable.

The plaintiff had a verdict.

Gibbs and *Marryatt* for the plaintiff.

Erskine for the defendant.

LAST SITTINGS IN TERM. 1802.

CHAPMAN v. LADBROOKE.

DEBT on bond.

When a person binds himself by bond to make a voluntary conveyance of lands descended to him as heir at law, he cannot be called upon to covenant against any incumbrances of his ancestors.

The defendant pleaded *non est factum*; upon which issue was joined.

The plaintiff then prayed that the bond and condition might be enrolled; which reciting that one *Thomas Ladbrooke*, the elder, had died intestate, and without issue, leaving the defendant his heir at law; that *Thomas Ladbrooke* the elder had given instructions to one Mr. *Chapman*, attorney *at law, to prepare his will; and by such instructions bequeathed, or intended to bequeath, the whole of his personal estate, after the same was turned into money, among one *Mary Edmunds* and the children of his late sister *Mary Harrall*; that *Samuel Edmunds* the husband of *Mary*, had, before the testator's death, contracted and agreed with him for the purchase of a certain messuage, for 120*l.* and had paid in part 38*l.* It then went on to recite, that *Thomas Ladbrooke* (the defendant) being duly impressed with an opinion, and being perfectly satisfied that the said *Thomas Ladbrooke* the elder purposed the disposition of his said personal estate in manner before-mentioned, had from his being entitled as the heir at law of his said uncle *Thomas Ladbrooke* the elder, deceased, to the sum of 82*l.* the remaining part of the purchase-money for the said premises sold; and which money the said *Thomas Ladbrooke* the elder intended, pursuant to the instructions of his will, should be divided in manner before expressed, agreed immediately upon receiving the remainder of the said purchase-money, to apply and dispose of the same in manner intended by his said uncle *Thomas Ladbrooke* the elder, deceased. The condition of the bond then was, that the defendant should, on the receipt of the said sum of 82*l.* the remaining part of the said purchase-money, pay, apply, and dispose of the same in the shares before mentioned, and also that the said *Thomas Ladbrooke*, the defendant, should, on or before *Lady-day* next, on payment of the said sum of 82*l.* the remaining part of the said purchase-money, well and properly convey and assure unto the said *Samuel Edmunds*, his heirs and assigns, the said messuage, or tenement, gardens, out-buildings, and premises, in *Rugby* aforesaid, so

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 lately

1802. lately occupied by the said *Thomas Ladbrooke* the elder, deceased.

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The plaintiff then suggested the following breach, pursuant to statute 8th of *William* III. ch. 9. that the defendant did not, nor would, on or before *Lady-day* next, after making the said writings obligatory, or at any time afterwards, although the said *Samuel Edmunds* was on that day ready and willing, and offered to pay to him, the said defendant, the said sum of 82*l.* the remaining part of the said purchase-money in the said condition mentioned, and properly convey and assure unto the said *Samuel Edmunds* the said messuage or tenement, garden, out-buildings, and premises in *Rugby* aforesaid, in the said condition as abovementioned; but wholly refused and neglected so to do, and therein failed and made default, contrary to the form and effect of the said condition of the said writing obligatory.

The plaintiff produced the deed which he had tendered to the defendant to be executed, when he at the same time tendered him the 82*l.* It was read, and was found to contain a covenant against any incumbrance, &c. of the defendant, or of his uncle the intestate.

It was objected: That he was not bound to execute that deed, as he was under no obligation to covenant against the acts of his intestate.

LAWRENCE, Justice. The defendant in this case, out of motives of respect to his uncle's intentions, and without any considera-[152]tion, enters into the deed upon which the present action is brought; by which he covenants to convey the property in question; that is as far as his interest goes; but he cannot be made to covenant for the acts of his ancestor; nor could it be contended that it should be so. The deed therefore called upon him to do more than he was bound to do; and therefore he was well warranted in refusing to execute it. The plaintiff therefore must have nominal damages only, as there is an issue on the *non est factum*.

Verdict 1*s*.

Erskine and *Balguy* for the plaintiff.

Espinasse for the defendant.

SITTINGS

1802.

June 3d.

SITTINGS AFTER TERM AT WESTMINSTER.

HARRIS, qui tam, *v.* HUDSON.

In debt *qui tam*, under the statute for usury, the day laid in the declaration is material, though laid under a *sciz.* and any variance from it is fatal.

THIS was an action of debt *qui tam.*

The declaration stated, that after the 29th of *Sept.* 1714, to wit, on the 26th of *March*, 1801, it was corruptly, &c. agreed between one *Thomas Stewart* and the defendant, that the defendant should lend to the said *Thomas Stewart* a large sum of money, to wit, the sum of 34*l.* and should forbear and give day of payment until a certain bill, bearing date the same day and year last aforesaid, drawn upon one *Thomas Stewart* by defendant, for the sum of 35*l.* payable to defendant, or his order, forty days after date, should become due; and that the defendant [153] should have for the lending and forbearance of the same, a premium of 1*l.* The declaration then averred the lending the said sum of 34*l.* and the forbearance and giving day of payment until the expiration of the time appointed for payment of the said bill; and that in pursuance of the said corrupt contract, on the same day and year aforesaid (to wit, the 26th of *March*) the defendant corruptly and usuriously took and accepted the said sum of 1*l.* for the forbearance and giving day of payment of the said sum; which exceeded the rate of 5*l.* *per cent.* contrary to the form of the statute.

The plaintiff proved the bill discounted, and that the discount was taken: the bill corresponded with the date; but it appeared in evidence, that the money was not advanced until the 27th of *March*, being the day after that laid in the declaration.

This was objected to as a fatal variance.

It was answered, that the 26th was laid under a *videlicet*, so was immaterial; and therefore no variance.

Lord ELLENBOROUGH. The day is material; it ascertains the time of forbearance; and it is a fatal variance.

The plaintiff was nonsuited.

Erskine and *Wigley* for the plaintiff.

Garrow and *Knowlys* for the defendant.

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June 3d.

Doe on demise Lord Say and Sele *v.* Guy, Executor.

The legatee of a term for years, on the executor's assenting, may maintain an ejectment immediately to recover.
Query, If the legatee of any specific legacy of a chattel, cannot also maintain an action for it?

THIS was an action of ejectment, to recover the possession of a leasehold house and premises in the parish of *St. George, Hanover Square.*

Mrs. *Mary Guy*, by her will, dated in 1801, bequeathed the house in question to the lessor of the plaintiff, and appointed the defendant her executor, who proved the will.

The testatrix died in *January*, 1802: upon her death, the lessor of the plaintiff applied to the defendant (the executor) by letter, requesting to be admitted into the possession of the house. He first answered, that having a large quantity of furniture in the house, it would not be convenient before *Michaelmas;* but by a subsequent letter he said, That finding he should not want the house so long as he supposed, he would give up the possession on the 25th of *April.* This letter was dated the 25th of *February.*

Possession was demanded on the 25th of *April;* when the defendant said, he could not give possession till *Michaelmas;* upon which a declaration in ejectment was delivered on the 28th; one demise of which was laid on the 26th of *April.*

At the trial it was first objected by *Erskine*, that this bequest of the house, being a legacy, no action could be sustained by a legatee, without shewing an assent by the executor to the legacy; and *Young* v. *Holmes*, 1 *Strange* 70, was cited: that,
[155] that being necessary, there was in this case an express dissent, on the part of the executor, to admit the legatee into possession until after *Michaelmas;* so that the plaintiff had brought his action too soon.

It was secondly objected, That no action at law would lie for a legacy; that that point had been expressly decided in the case of *Deeks* and another v. *Strutt*, 5 *Term Reports*, 690, in which the former cases of *Atkins* v. *Hill*, *Cowp.* 284. *Hawkes* v. *Saunders*, *ib.* 289, had been considered as overruled.

Lord Ellenborough overruled both objections. As to the first, his Lordship said, that it was certainly necessary to shew an assent by the executor; but that he thought there was an assent by the executor sufficient to enable the legatee to support the

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the action, he having by this letter promised to give him possession on the 25th of *April.*

As to the second point, his Lordship said that he would reserve it; but that it appeared to him, that in the case of a chattel, a specific legacy differed materially from that of a sum in gross, chargeable upon the funds in the executor's hands, distributable in the course of administration: That by the assent of the executor to the specific legacy in question, the property vested in the legatee, and enabled him to maintain the action.

Verdict for the plaintiff, with leave to move to enter a nonsuit.

Gibbs and *Marryatt* for the plaintiff.

Erskine and *Ch. Warren* for the defendant.

This case was afterwards moved; when the Court of *King's Bench* agreed in opinion with the Lord Chief Justice; and the distinction is there adopted between a legacy of a specific thing, and a legacy payable out of the general funds of the testator's estate. A specific legacy, on the executor's assenting to it, vests in property immediately in the legatee; and he may maintain an action at law for it; but it is otherwise where it is to be payable out of the general fund. In the case of *Deeks* and another v. *Strutt,* cited at the trial, it was the case of a general legacy without any express assent of the executor appearing; but for which an action was endeavoured to be sustained at law, on the implied assent of the executor on an account of assets; which implication the Court held that they could not raise. [156]

SEVERIN v. KEPPELL.

June 3d.

When goods are delivered under a contract, as to do something with them, and to deliver them according to the party's undertaking, and omission of the party's doing what he so undertook to do, will not sustain an action of trover, unless there has been an actual refusal to redeliver.

THIS was an action of trover, for several articles of plate and plated goods, stated in the declaration. The defendant was a silversmith; and they had been delivered to him for the purpose of putting glasses into them. He had been applied to, on many occasions, for the articles so delivered to him; he made excuses, and said, the glass was not come from the glass-blower's: there was no denial at any time to deliver the goods, but rather excuses for not delivering them: however, in one instance, the defendant admitted that the glass was come home; but he then said, his wife was out, and he could not deliver them.

He afterwards delivered the plated goods, and said he had sent the silver ones home; which was not true.

It was objected by the defendant's counsel, that * on the evidence

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SEVERIN v. KEPPELL.

dence given, there was no conversion sufficient to support the action of trover.

Erskine, for the plaintiff, contended, That the defendant having in the last instance, admitted his possession of the goods, and having made a frivolous and false pretence for not delivering the articles, after his repeated excuses before made, that it was evidence of conversion sufficient to go to the jury; particularly from the circumstance of his having returned the plated goods, and pretended to have sent home the other; which was not the case.

Lord ELLENBOROUGH said, he thought the plaintiff should be nonsuited, as there was no evidence to sustain the action in its present form: that what begins in contract, a non-performance of what the party so undertakes to do; or a bare non-delivery of what he undertakes to deliver, is not to be considered as of itself amounting to a *tortious* conversion. There was a case in the Court of *King's Bench* some time ago, in which that principle was recognized. It was an action of trover against a carrier, for not delivering goods. If a carrier says he has the goods in the warehouse, and refuses to deliver them, that will be evidence of conversion, and trover may be maintained; but not for a bare non-delivery, without any such refusal. So in this case, the goods were delivered to the defendant to work upon. There was no evidence of any refusal by him to deliver them; but, on the contrary, he makes excuses for not doing it. The plaintiff must be called.

[158] *Erskine* and *Marryatt* for the plaintiff.

Garrow for the defendant.

Vide *Ross* v. *Johnson*, 5 *Burr*. 2825, where the same doctrine is held in the case of a wharfinger.

June 4th.

BROWN v. ALLEN and OLIVER.

THIS was an action of assault against two. On the part of *Allen*, one of the defendants, the assault was proved to have been committed with more violence, and attended with more circumstances of aggravation, than was the case of *Oliver*, the other defendant.

Lord ELLENBOROUGH, in summing up the evidence to the jury, told them, they could not sever the damages, and give more against one defendant than against the other; but that they

they should therefore take it as their rule in estimating the damages, to give their verdict against both, to the amount to which they thought the most culpable of the defendants ought to pay.

1802.

BROWN v. ALLEN and OLIVER.

The jury found 100*l.* damages.

Erskine, *Garrow*, and *Lawes* for the plaintiff.

Gibbs and *Const* for the defendants.

June 4th.

DANGERFIELD v. WILBY.

[159]

Where a promissory note has been given for money due by the defendant to the plaintiff, who declares on it, together with the money-counts, he must prove the note lost, or destroyed, before he can have recourse to the money-counts, if it appears that the money so claimed was that for which the note was given.

THE declaration in this case stated, That the defendant was indebted to the plaintiff 10*l.* on a promissory note for that sum, made by the defendant, payable to the plaintiff, with the other counts for money had and received, and on an account stated.

The plaintiff did not produce any promissory note, which he stated to have been lost; nor offered any evidence of its being destroyed, or not in existence; but gave in evidence, That the defendant had, on the money being demanded, apologized for not paying the 10*l.* on account of the note; and there rested his case.

Garrow, for the defendant, objected: That it appearing by the declaration, that the cause of action arose under a note, which was stated in the pleadings, and which it appeared was in existence, the plaintiff should not be at liberty to go into evidence of any cause of action arising out of the note, as the promise to pay, which was the only evidence, was to pay the note.

The plaintiff's counsel contended, That the note was only evidence of the debt for money lent, or otherwise claimed by the plaintiff from the defendant: and that he should therefore be at liberty to abandon the note, and go for the consideration of it; which was in the present case for money lent.

Lord ELLENBOROUGH said, he was of opinion the plaintiff was not so entitled; for as the note, for any thing that appeared in evidence, was in existence, it might be still in circulation, and the defendant be liable to be called upon to pay it; so that he might be subjected twice to the payment of the same demand. It was therefore incumbent on him to shew it to be lost, so that the defendant should not be again subjected to the payment of it. As to any demand therefore on account of the note, he thought the plaintiff not entitled to recover. [160]

The

1802.

DANGERFIELD v. WILBY.

The plaintiff was nonsuited; he having relied on the promise only.

Erskine and *Espinasse* for the plaintiff.

Garrow for the defendant.

June 5th.

*EDMONSTONE v. PLAISTED, Gent. one, &c.

To prove that a writ issued in a particular cause, it is not sufficient to prove the *præcipe* by the filazer's book, and to give notice to the party to produce it: it should be shewn that, after the return, the treasury was searched, and no such writ found; and that it was in the party's hands, who had notice to produce it.

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THIS was an action of debt to recover several penalties from the defendant, for practising as an attorney, without a certificate, contrary to the statute.

The first act of the defendant, as an attorney, charged in the declaration, for which the penalty was stated to have been incurred, was the suing out a *pluries* writ by him, in a suit of *Smythes* against the present plaintiff.

To prove this allegation in the declaration, the plaintiff called the deputy filazer, who produced the filazer's book, in which was an entry of the *præcipe* in the above suit. This was offered as evidence of such writ having been actually sued out; and then the plaintiff called upon the defendant to produce the writ, having given notice to the *defendant to produce it; and on his failure to do so, proposed to give a copy of it in evidence.

The defendant's counsel objected: That this copy was inadmissible: that the writ itself ought to be produced, or an office-copy, as the writ ought to have been returned into the *Treasury*, from whence an office-copy could be had to give in evidence, and which could always be had, as the plaintiff might be called upon by a rule to return it.

It was answered, That the process was not bailable; and that it never was delivered to the sheriff; but that, under the statute, a copy of the process only was served on the defendant, and the writ remained in the hands of the party, who was, therefore, bound to produce it, if notice was given to do so, as had been done here.

Lord ELLENBOROUGH said, That he must presume that every thing was done which legally ought to have been done: that every writ ought to have been returned: that it would, therefore, be incumbent on the plaintiff to shew that he searched the *Treasury*, and found no such writ; and further, that after the return of the writ, it was in the hands of the defendant. He therefore thought the evidence, as to that part, insufficient; and that count was abandoned.

The

1802.

EDMONSTONE v. PLAISTED, Gent. one, &c.

Under an averment in a declaration for penalties "that the defendant had filed a declaration in a certain suit then depending," it is sufficient evidence to produce a declaration out of the office, indorsed in the defendant's hand-writing, as to the time for pleading, without shewing a suit otherwise commenced.

The second count of the declaration stated, That the present defendant did then and there file a declaration in a certain suit then depending.

The evidence on the part of the plaintiff, as *to this breach, was this: The plaintiff produced a declaration taken out of the office, which was written in the hand-writing of the defendant; and which was indorsed to plead in four days: he also produced a notice of declaration filed; which was also in the defendant's hand-writing, and had been served on the plaintiff.

It was objected by the defendant's counsel: That this was insufficient: that the count referred to a suit then depending, which being the same referred to in the count which had not been proved, there was therefore no such suit in proof as that in which the declaration in this cause stated a declaration to have been delivered.

It was answered, That it was sufficient for the defendant to shew, by the production of the declaration and indorsement, that there was such a cause depending as that stated in the declaration; as the Court would not presume that there was no such cause depending, when a declaration appeared to have been filed in it.

[*162]

Lord ELLENBOROUGH said, he was of opinion that the production of the declaration, as taken out of the office, and proved to be in the hand-writing of the defendant, was evidence sufficient to satisfy the averment in that count; and that the plaintiff was therefore entitled to recover on that count; but reserved the point*.

Verdict for one penalty.

Gibbs and *Lawes* for the plaintiff.

Erskine and *Garrow* for the defendant.

* I believe that the point was never moved; and that the defendant acquiesced in the verdict.

[163]

DALISON *v.* STARK.

June 9th.

Where an order is given verbally for goods, and the person to whom it is given puts down the terms of it in writing, as a memorandum, but it is not signed by the person ordering the goods, the terms of the order may be given in evidence, without producing the written memorandum.

CASE to recover the value of a quantity of soap, sold by the plaintiff to the defendant.

To

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DALISON v. STARK.

To prove the agreement for the sale, the plaintiff called a witness, who stated, that he was employed to procure orders for Mr. *Dalison*, the plaintiff, who allowed him a commission for so doing; and that he had received the order from the defendant for the soap in question.

He was asked, if the order was not in writing? He answered, that it was. But being particularly interrogated as to the manner in which it was made, and the circumstances of its being reduced into writing, he stated, that the order was given to him by the defendant verbally; and that he had put it down in writing to assist his own recollection, merely as a memorandum. It was not made by the buyer, nor was his name signed to the memorandum which was made by the witness.

It was objected: That this memorandum, being in writing, ought to be produced; that it contained the terms of the sale, and was of course the best evidence; so that no parol evidence could be admitted to prove the terms of it.

It was answered, That though what was in writing contained the terms of the contract, it was not in fact the contract, the contracting party never having signed it, as he gave the order verbally.

Lord ELLENBOROUGH said, That he thought the witness might
[164] be allowed to give parol evidence of the contract; and that the memorandum was not necessary to be produced. This was not the case of a sale-note, or contract made by a broker, who acted between the parties, and who made the memorandum as agent to both, and as containing the terms of the contract; in which case the memorandum ought to be produced: but that this was the act of the witness, as a servant of the plaintiff, to assist his memory; and was not signed by the party: it was therefore not necessary to produce it.

The plaintiff was nonsuited on other grounds.

Erskine and *Lawes* for the plaintiff.

Garrow and *Gibbs* for the defendant.

* *June* 9th.

To prove a title to the lessee of premises, in an action of trespass for breaking and entering them, the lessor is an inadmissible witness.

SMITH *v.* CHAMBERS.

TRESPASS for breaking and entering the plaintiff's close, at *Milbank*.

Plea, Not Guilty.

The trespass was committed on an embankment on the side of the river *Thames*, which the plaintiff claimed as lessee: the defendant also made title to the *locus in quo*, as lessee. To

To prove that the place belonged to the plaintiff, his counsel called the landlord, under whom he held it. He was objected to, as incompetent; inasmuch, as by coming to support a title in this plaintiff to the place in question, he was thereby establishing a title in himself to the same premises.

Erskine, for the plaintiff, contended, That the action being trespass, was founded on possession only; it was therefore sufficient for him to shew the plaintiff in possession, which the landlord could prove, and which evidence was not connected with the title. If, however, there was a covenant of quiet enjoyment from him to the plaintiff, in that case he admitted that he was incompetent; but in no other case: that the same principle which, if it was admitted, would render him incompetent, applied to the present case. [165]

Lord ELLENBOROUGH said, If the witness demised the premises to the plaintiff, though without the covenant alluded to, he was bound to support the title; as on the word "demised," a covenant in law is raised, which would support an action by the lessee against the lessor, in case he was evicted from the possession. The witness, therefore, was to support his own title to the premises by his own testimony; and he thought he was upon that ground inadmissible: he was accordingly rejected.

The plaintiff was nonsuited.

Erskine and *Marryatt* for the plaintiff.

Garrow for the defendant.

DRAKE *v.* SHORTER.

June 9th.

Where an injury has been done to a chattel belonging to another, in endeavouring to do a service to such person out of charity, or to prevent mischief, from the act of such persons, an action of trover will not lie for it.

TROVER for a boat.

Plea of General Issue.

The case stated on the part of the plaintiff, was, That the defendant, who was employed in an *invention for making a vessel sail against wind and tide, had employed the plaintiff to work on her: that while the vessel was so working on, she took fire: that the defendant took a boat belonging to the plaintiff, to endeavour to extinguish it; but that she sunk, and was lost.

Garrow, for the defendant, stated his defence to be, That while the plaintiff was working on the vessel, it was his duty to have taken care of her; and that the interference, in this case, was to prevent the fire spreading, by means of which the accident happened; which he contended was lawful. [*166]

Lord ELLENBOROUGH said, That if the fact was so, he thought it

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DRAKE v. SHORTER.

it amounted to a defence: that what might be a *tort* under one circumstance, might, if done under others, assume a different appearance. As for example: If the thing for which the action was brought, and which had been lost, was taken to do a work of charity, or to do a kindness to the party who owned it, and without any intention of injury to it, or of converting it to his own use; if, under any of these circumstances, any misfortune happened to the thing, it could not be deemed an illegal conversion; but as it would be a justification in an action of trespass, it would be a good answer to an action of trover.

The defendant failed in proving the circumstances as to the ship being in the plaintiff's care; so that the accident of the fire proceeded from the defendant himself; and the plaintiff had a verdict.

Erskine and *Marryatt* for the plaintiff.

Garrow for the defendant.

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CALVART v. HORSFALL.

To entitle a party to maintain trespass for the mesne profits, it is not necessary to execute an *habere*, if the plaintiff has been let into possession by the defendant.

TRESPASS for the mesne profits of certain premises, situated in the parish of *Pancras*.

The plaintiff proved the judgment in ejectment, in a cause of *Doe* on the demise of *Calvart* v. *Roe*.

To prove that the defendant was in possession of the premises at the time of the ejectment, the plaintiff called the person by whom the declaration in ejectment was served upon the premises: he said, That he served the declaration on a person who said his name was *Horsfall*; and that he explained to him the notice, at the foot of the declaration, to appear.

The defendant had let the plaintiff into possession of the premises; but no writ of possession had ever been executed after the judgment in ejectment.

Gibbs said, the only question was, Whether the plaintiff could maintain an action of trespass for the mesne profits, without having a writ of possession executed? That as possession was necessary to maintain trespass, it appeared by the proceedings in the ejectment, that he was not in possession when the ejectment was brought, nor legally so until put into possession under the writ of possession.

Lord ELLENBOROUGH. It has been proved that the plaintiff has been in possession by consent of the party. I hold, That

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being in possession by the act of the party when he brings this action, that that is sufficient to entitle him to maintain the action. 1802.

Calvart v. Horsfall.

Garrow and *Barrow* for the plaintiff.

Gibbs for the defendant.

Cary *v.* Kearsley.

[168]

June 11th.

In an action on the case for pirating a book, it is not sufficient evidence of a general pirating, to shew that there were particular errors and mistakes in the printing of the original work, which were copied verbatim into the pirated edition.

THIS was an action on the case, for infringing the plaintiff's copy-right, in an Itinerary, or Book of Roads, of which the plaintiff claimed to be the proprietor.

The plaintiff proved, that for nine preceding years he had been employed in taking and preparing surveys and distances on the different roads, to the amount of nine hundred miles, which were embodied into the work; so that the book was compiled from actual surveys made by himself.

Having proved by this means his right as author to the original work,—to prove that the defendant's book was a piracy of it, he called a witness who had compared them: the names of places and distances generally corresponded; but he proved that several mistakes and errors, which had crept into the plaintiff's book in the printing, were copied verbatim into the defendant's. These were principally in the names of places, as *Filmer Hill* for *Farmer's Hill*; and in the signs, *the Duke of Bolton's Arms* for *the Duke of Beaufort's Arms*; from whence he inferred that the defendant's book was a copy from his, and not an original compilation.

Lord Ellenborough said, that he thought that the proof of these errors transmitted into the defendant's book, would not support the declaration for a general printing and pirating of the plaintiff's work; the defendant was authorized to use a work published as this of the plaintiff's, to make extracts from it into any original work of his own; and mistaking the names and descriptions, and taking such detached parts, was only using an erroneous dictionary. It was therefore necessary to go further. The sixth count however was found to correspond, in laying the particular injury, that of transcribing without his consent the particular matter. [169]

The first publisher of a book, even though he has improperly obtained the materials of it, may maintain an action for pirating it.

The counsel for the defendant were examining the witness, who was an officer of the post-office, to the fact of, Whether the survey stated to have been made by *Cary* the plaintiff, was not at

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CARY v. KEARSLEY.

the expense of the post-office, professing the object to be, to shew that the copy-right belonged to the post-office, and not to the plaintiff; so that he could maintain no action for infringing it?

Lord ELLENBOROUGH. I do not know that that will protect the defendant: at law the first publisher, even though he has abused his trust, by procuring the copy, has a right to it, and to an action against a person who publishes it without authority from him. It may be a ground in equity, as between the person entitled, and the person who first published it; but it does not destroy the right of the latter to sue a person pirating that right.

It is not sufficient to support an action for pirating books, that part is found transcribed into another, for it is lawful to use former publications in composing a new work if they are fairly taken, without being made colour for publishing the original work.

It appeared, that in the book published by *Cary*, great quantity of new matter had been added, which had been transcribed into the defendant's book, with additions, and observations had been made on it, and several routs were broken into two; but it appeared that there was no entire particular paragraph transcribed.

Lord ELLENBOROUGH. If I adopt the works of cotemporary writers, and embody them into my own, it makes a new work.

*Mr. *Erskine*. Suppose a man took *Paley*'s Philosophy, and copied a whole essay, with observations and notes, or additions at the end of it, would that be piracy?

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Lord ELLENBOROUGH. That would depend on the facts of, whether the publication of that essay was to convey to the public the notes and observations fairly, or only to colour the publication of the original essay, and make that a pretext for pirating it; if the latter, it could not be sustained. That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action; a man may fairly adopt part of the work of another: he may so make use of another's labours for the promotion of science, and the benefit of the public: but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term the *animus furandi?* such as was the case put by Mr. *Erskine* of *Paley*'s Philosophy. Look through the book, and find any part that is a transcript of the other; if there is none such; if the subject of the book is that which is subject to every man's observation; such as the names of the places and their distances from each other, the places being the same, the distances being the same, if they are correct, one book must be a transcript of the other; but when, in the defendant's book there are additional observations, and in some part of the book I find corrections of misprinting (his Lordship here pointed out some) while I shall think myself

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self bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science.

*I think great part of the book that I have seen, Mr. *Kearsley* might fairly avow that he had taken it from Mr. *Cary's* book. I shall address these observations to the jury, leaving them to say, whether what so taken or supposed to be transmitted from the plaintiff's book, was fairly done with a view of compiling a useful book, for the benefit of the public, upon which there has been a totally new arrangement of such matter,—or taken colourable, merely with a view to steal the copy-right of the plaintiff? [*171]

The counsel for the plaintiff consented to be nonsuited.

Erskine, *Garrow*, and *Holroyd*, for the plaintiff.

Dallas, *Gibbs*, and *Tomlins* for the defendant.

MILWARD, Assignee of GATES, *v.* FORBES.

Where a person is examined at a private examination before Commissioners of bankrupts, and that examination is taken down, it is sufficient if so much only is taken down as is conceived to be necessary to be used in evidence, provided such part has been read over to him, and he has signed it. The whole of his examination need not be taken down, to make that evidence which applies to the matter in dispute.

THIS was an action of trover by the assignees of *Gates*, a bankrupt, to recover from the defendant the value of fifteen sacks of flour.

The case stated to charge the defendant was, That after an act of bankruptcy committed, the defendant had taken away from the bankrupt's house the fifteen sacks of flour, and converted them to his own use.

The defendant had been examined before the commissioners of bankruptcy at a private examination: his examination was taken in writing; it was *produced by the solicitor, under the commission signed by the defendant, and offered in evidence. [*172]

Garrow, in examining the solicitor who produced the proceedings, interrogated him very particularly, Whether what was then put down, and there produced, was all that had been said by the bankrupt on his examination? or, Whether only so much was taken down as was sufficient to be made use of on the trial? contending, that all that had passed at the examination should have been taken down and produced as his deposition; as the part omitted might give a different colour to the transaction.

The witness said, That the defendant had said more at the examination than what was so taken down; that he had taken down only what he considered as relevant; but that nothing which was relevant was omitted, whether it made for or against the party.

 Lord

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MILWARD, Assignee of GATES, v. FORBES.

Lord ELLENBOROUGH asked, If the examination had been read to him before he signed it? Being answered in the affirmative, he said, That, as after the party's hearing it so stated from his own words, and the examination was read over to him before he signed it, it must be taken to be a statement of facts admitted by him; and was therefore evidence.

Garrow then stated his defence to be, That the goods in question had been procured by *Gates* from the defendant, in consequence of a conspiracy between him and one *Winter*, to defraud the defendant; the goods having been delivered on the *Friday* for a ready money price, when *Gates* pretended he had not then
[173] a check, but would give one on *Monday:* That on *Saturday* they were handed over to *Winter*, who was his journeyman, on which *Saturday Gates* absconded: that being therefore obtained with a fraudulent view, no property was taken from the defendant, nor of course passed to the assignee under *Gates*'s bankruptcy, so that the defendant might resume his property; and cited *Aickle*'s case*.

Per LORD ELLENBOROUGH. There was a contract, and the defendant let the bankrupt have them on sale, and with a view to obtain payment. In *Aickle*'s case, the note was given to him to discount as a servant of the prosecutor; there was no property passed to him: the cases are different. I think there is a sufficient change of property to sustain the action.

Garrow then proposed to impeach the petitioning creditor's debt, and a witness was called to prove what the petitioning creditors had said with respect to the amount of his debt, in order to bring it within 100*l*.

Lord ELLENBOROUGH said, he could not admit the declaration of a person in a case where he was not a party; and rejected it.

Verdict for the plaintiff.

Erskine and *Marryatt* for the plaintiff.

Garrow and *Maddock* for the defendant.

* See *Aickle*'s case, in *Leach*'s Crown Cases, fol. 266. 1st Edit.

HISCOX

1802.

June 11th.

Hiscox *v.* Greenwood.

If a servant employs a tradesman to do any work, who has not been employed before by his master, and the tradesman does the work without any communication with the master, though the thing to which the work was done was the property of the master, he is not liable.

TROVER for a one-horse chaise.

The case stated on the part of the plaintiff was, That the chaise having been broke by the negligence of his servant, and without his knowledge, That the servant had, without acquainting him, and without any orders from him, taken the chaise to the defendant, who was a coachmaker, to get it repaired: that the defendant had never been employed by the plaintiff as his coachmaker, or to do any work for him. Some repairs had been done to it, to a very small amount. The defendant refused to deliver it up till paid the amount of his demand; contending, that he had a lien on the chaise, on account of the work which he had done to it.

Lord Ellenborough said, That the defendant had no right to hold the chaise as a lien. Whatever claim of that sort he might have, he must derive it from legitimate authority: that unless the master had been in the habit of employing the tradesman in the way of his trade, it should not be in the power of the servant to bind him to contracts of which he had no knowledge, nor to which he gave his assent. It was the duty of the tradesman, when he was employed, to have inquired of the principal if the order was given by his authority; but having neglected to do so here, and the master having never employed him, the master was not liable to the demand; and the detainer of the chaise was unlawful. [175]

Verdict for the plaintiff.

——— for the plaintiff.

Gibbs and *Garrow* for the defendant.

SITTINGS AFTER TERM AT GUILDHALL

Grant *v.* King.

June 14th.

Mere length of time elapsed between the signing of the policy and the sailing, is not sufficient to avoid a policy; it is matter of evidence to be left to the jury, if such a time has elapsed as amounts to an abandonment.

ACTION on a policy of insurance on the ship ———, on a voyage at and from *Brest* to *London*, against *British* captures, with liberty to carry simulated papers.

The

1802. GRANT v. KING.

The vessel was bought the middle of *July*. She then lay at *Brest*; and the insurance was effected in *August*, 1789.

The vessel sailed in the month of *March* following. The port of *Brest* was then blocked up by the *British* fleet; the plaintiff was an *American*; and the object of the policy was to protect her from *British* captures only.

The nature of defence was, the length of time which elapsed between the sailing of the ship and the signing of the policy; which, under the authority of the case of *Chitty* v. *Selwyn* and *Martyn*, in 2 *Atk*. 359, it was contended, discharged the underwriter. In that case Lord *Hardwicke* decided, That where a ship is insured at and from a place, as long as the ship is preparing for the voyage, the insurer is liable: but if all thoughts of the [176] voyage are laid aside, and the ship lies there six or seven years, with the owner's privity, it shall never be said that the insurer is liable.

Lord ELLENBOROUGH said, That to be sure, while she was in a fair state of preparation for the voyage, it was covered by the policy; but if the voyage was abandoned for a length of time, the insurers could not be held liable.

The plaintiff, to account for the delay, called a witness, who proved the purchase of the vessel at *Brest*: that he found a great difficulty in procuring *American* sailors to navigate the vessel: that he left *Brest* and came to *England* for the purpose of procuring them; by which much time was lost, and the sailing of the ship thereby delayed.

The defendant endeavoured to establish, That there was considerable and unnecessary delay in sending over the men from *London*; none having been sent off till the latter end of *November*.

Lord ELLENBOROUGH. Under the then existing state of affairs, at the time of underwriting the policy, the defendant cannot spin out the time day by day. The question, Whether there was an abandonment of the original adventure? is to be decided from a fair review of all existing circumstances at the time when the voyage might reasonably be presumed to commence. Here the extreme difficulty of procuring men is to be taken into consideration. To discharge the policy, there must be a clear imputation of waste of time. Mere length of time elapsing between the sailing of the vessel and the underwriting of the policy, is not of itself sufficient to avoid the policy; it is [177] capable of explanation. You cannot expect every act of earnest

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and extreme promptness, hardly short of the institution of a new adventure, shall, in my opinion, be sufficient to amount to a desertion of the policy.

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GRANT v. KING.

It was left to the jury, who found a verdict for the plaintiff.

Erskine and *Giles* for the plaintiff.

Park for the defendant.

CLARK v. GRAY.

June 14th.

Where carriers give notice that they will not be liable for goods lost, beyond the value of 5*l*. that extends to the property of passengers going by the coach or other carriage; and not to goods sent to be carried only.

THIS was an action on the case, against the defendant, as proprietor of a stage-coach, to recover the value of a trunk sent by the defendant's coach.

The plaintiff had taken her place at the *Bell Savage* Inn, slept there at night, and brought her box with her to the inn; it was marked *Passenger* on the lid. On the next morning the coach set off. The guard did not take his place behind. When the coach came to *Islington*, the guard announced to the passengers that the parcels had been lost; and Mrs. *Clark*'s trunk among the rest.

Gibbs stated, that the defence relied on was, that the owners had given notice, that they would not be liable for any parcel of above 5*l*. value, unless paid for as such. He then contended, That this notice applied to the case of goods only sent to be carried, and not to the case of passengers' luggage.

Lord ELLENBOROUGH said, That it had been decided, that the luggage of passengers came within the exception.

Erskine stated, That notice had been given by hand-bills, and by a large board put up in the coach-office, in the following terms:— [178]

" Take notice, No more than 5*l*. will be accounted for any goods or parcels delivered at this office, unless entered as such, and paid for accordingly."

It was said by the plaintiff's counsel, That it did not appear that the plaintiff was apprized of this notice, or knew of it in any way whatever. He said, That Judge *Buller* had laid it down, that all the coaches in the kingdom had adopted the notice for their own security. It was the duty of the passengers to make the inquiry; and the innkeeper might rely on the general notice.

Lord ELLENBOROUGH. I think, where the party has taken the precaution mentioned, it is presumptive notice to all persons. In a case from *Lancaster*, where it was published in the county-paper,

1802.

CLARK v. GRAY.

paper, That persons in a particular manufactory would claim a lien on goods sent to be manufactured, it was adjudged, by such publication in a newspaper, to be a sufficient notice. But I must see that the defendant did use such precaution, and give such notice. With respect to its being the general usage of all the innkeepers, I think that it is not evidence. Carriers are subjected to losses by the general law of the realm; I therefore think, that every man must discharge himself by notice given by himself; and that it was incumbent on him to prove that such notice was given in this case.

The defendant proved the notice sufficient.

[179] *Gibbs* then relied, That, under this notice, they were liable for 5*l.*; that he, at all events, was entitled to a verdict for that sum.

The defendant denied any liability; and cited *Clay* v. *Willan*, 1 *H. Blacks.* 298.

Lord ELLENBOROUGH. This limits the amount of their liability; but I will reserve that point, whether there should not be a special count on the special contract, as excepted in their notice?

Gibbs and *Marryatt* for the plaintiff.

Erskine and *Holroyd* for the defendant.

June 14th.

WYBURD v. STANTON.

A poundage agreed to be paid to a person for recommending customers, is illegal.

ASSUMPSIT for goods sold and delivered.

Plea of the general issue and set-off. One part of the set-off was for certain poundage and reward, before that time agreed to be paid, and then due and payable from the plaintiff to the defendant upon and in respect of certain goods and merchandise before that time sold and delivered by the plaintiff to one *James Perry Andrew*, for and in consideration of the defendant having recommended the said *James Perry Andrew* to buy the said goods and merchandise from the plaintiff.

Upon this being stated, Lord ELLENBOROUGH said, He thought that this demand could not be supported; it was a fraud on third persons.

It was accordingly rejected.

SITTINGS

SITTINGS AFTER TERM IN THE COMMON PLEAS. 1802.

Martin v. Thornton.

Where matters have been referred to arbitration, it is matter of evidence whether a particular matter of complaint has been subjected to the arbitrator's consideration.

THIS was an action for malicious prosecution, and for maliciously holding the plaintiff to bail.

Plea of Not Guilty.

The defendant, Colonel *Thornton*, had employed the plaintiff to write a pamphlet for him, respecting a dispute which he had with an officer of a regiment of militia, then commanded by him.

In the course of that business, the defendant had paid to the plaintiff, as a remuneration, two sums of 70*l.* and 50*l.* These sums were considered by the plaintiff as an inadequate reward; and he had sued the defendant for a further sum of money on that account. While that action was so depending, the present defendant had arrested the plaintiff; and held him to bail for the two sums above mentioned, which he had so paid to the plaintiff.

Both causes were referred to arbitration.

The arbitrator awarded, That the plaintiff had been fully paid; but that there was no cause of action against him on account of the money which he had so been paid: and for so arresting and holding him to bail, the present action was brought.

Serjt. *Cockell*, for the defendant, contended, That the award was conclusive evidence against any right in the plaintiff to recover; the reference having been of all matters in difference, [181] which necessarily included the ground of the present action, the grievance complained of by it being then subsisting; and an object of complaint upon which the arbitrator had decided; and he offered the award in evidence.

It was contended not to be admissible.

Lord Alvanley. What amounts to accord and satisfaction may be given in evidence, under the general issue. Lord Holt says, That it was an innovation; but it has since been well settled, that whatever goes to shew, that the plaintiff had no cause of action, may be given in evidence under the general issue. If therefore the object of the present action had been before in claim before the arbitrator, the award was conclusive of the plaintiff's right to recover in this action; but that must be proved.

The award was produced. It awarded, That in the cause of

1802.

MARTIN v. THORNTON.

Thornton v. *Martin*, the plaintiff had no cause of action; and awarded to the plaintiff the costs; and that, in the other action, *Martin* v. *Thornton*, the plaintiff *Martin* had no cause of action; and ordered certain manuscripts and printed papers to be given up; and then ordered also, that the parties should execute mutual releases.

An arbitrator may be called to prove what matters were claimed before him, on a reference.

The defendant's counsel then called the arbitrator, to prove, That the reference before him was a reference of all matters in difference; and that a claim had been made before him by *Martin*, for compensation for the injury.

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This evidence was objected to; and it was contended, That parol evidence was not admissible, as the award should speak for itself: but it was ruled by Lord ALVANLEY to be admissible and sufficient evidence.

He was accordingly examined.

The plaintiff was nonsuited.

Serjt. *Shepherd* and *Wigley* for the plaintiff.

Cockell and *Best*, Serjts. for the defendant.

WILKINSON v. FRASIER.

If a sailor engages on a whaling voyage, and is to receive a certain proportion of the profits of the voyage in lieu of wages, when the cargo is sold, he may maintain an action for his wages against the Captain; and shall not be considered as a partner.

ASSUMPSIT against the defendant, who was the captain of a ship employed in the southern whale-fishery, to recover seamen's wages.

The action was brought, and the plaintiff declared on the usual articles for voyages on that fishery; by which the seamen are, by their articles, to receive a certain share of the produce of the cargo in lieu of wages.

The plaintiff proved the articles; which were signed by the plaintiff, as a mariner; and by the defendant, as captain; the sailing of the vessel on the voyage, and the plaintiff's service; and that the oil, of which the cargo was composed, had been sold, and produced a certain sum; for the share of which the plaintiff went.

These articles stipulated, on the part of the sailors, That they should proceed on the voyage, do their duty, &c.; and on the part of the captain, That the produce of the voyage should be

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divided in certain proportions: *viz.* A certain proportion to the owners, a certain proportion to the captain, and the rest to the other officers and seamen. The proportion of a common sailor was, a one-hundred and ninetieth part.

Best,

Best, Serjt. objected: That the action could not be maintained against the Captain, who was the present defendant; because the defendant, as well as the plaintiff, was to be paid out of the profits of the voyage: that they were therefore partners; and as one partner could not maintain this action against another, the action was not maintainable.

Lord ALVANLEY said, He would not nonsuit the plaintiff on such an objection: That the plaintiff, and the other sailors, were hired by the defendant and the owners, to serve on board the ship for wages to be paid to him; and the share was in the nature of wages, unliquidated at the time, but capable of being reduced to a certainty on the sale of the oil, which had taken place: and that he should not therefore consider them as partners, but as entitled to wages to the extent of their proportion in the produce of the voyage.

There was a verdict for the defendant.

Cockell and *Lawes* for the plaintiff.

Best, Serjt. for the defendant.

END OF EASTER TERM.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

TRINITY TERM, 42 GEORGE III. 1802.

SITTINGS ATER TERM AT WESTMINSTER.

July 8th.

When a debt of a bill six years standing is demanded, and the defendant says he has paid it, and will shew the receipt, but does not, it is not such an acknowledgment as takes the debt out of the statute of limitations.

Birk v. Guy, Gent.

ASSUMPSIT for saddlery-work, furnished to the defendant by the plaintiff.

Plea of *non assumpsit* and the statute of limitations.

To prove a new promise by the defendant, the plaintiff proved, that on payment being demanded the defendant said that he had paid the plaintiff's bill, and taken a receipt, which he had. On a second application being made, he again said he had paid it; and would send a copy of the receipt: a copy never was sent, and the action was then commenced.

The plaintiff's counsel contended, That any kind of acknowledgment of a debt, took it out of the statute; and that here was an acknowledgment of the debt, which entitled the plaintiff to recover.

Lord Ellenborough ruled, That this did not amount to a new promise as contended by the plaintiff's counsel. He added, that this was the very case which was meant to be protected by [185] the statute of limitations; where a man had lost his evidence of payment: that under that circumstance, he had a right to resort to the protection of the statute.

Nonsuit.

Garrow and *Lambe* for the plaintiff.

Marryatt for the defendant.

DOE on the Demise of Cox and others.

EJECTMENT for premises in the parish of *Saint Ann, Limehouse.*

A misdescription of the premises in a notice to quit, is not fatal, if they are otherwise sufficiently designated that the party to whom notice has been given, has not been misled by it.

The notice was to this effect:—"Take notice, that you quit the premises which you hold of me, situated, &c. commonly called or known by the name of the *Waterman's Arms.*"

The premises for which the ejectment was brought, was a public-house, called the *Bricklayer's Arms.*

Erskine contended, That the notice was bad, as not being a proper description of the premises held by the defendant.

But it being proved that there was no house of the sign of the *Waterman's Arms* in the parish, and that the defendant did not hold any other premises of the lessor of the plaintiff, Lord ELLENBOROUGH said, If the defendant was misled by the notice, the plaintiff ought to be turned round: but the notice being to quit certain premises, with the words "which you hold of me," there could, therefore, be no dispute, nor doubt of the identity [186] of the premises; and the notice was sufficient to entitle the plaintiff to recover.

Garrow and *Carr* for the plaintiff.

Erskine and *Yates* for the defendant.

ARCHER *v.* WILLINGRICE.

July 9th.

THIS was an action of debt on the statute 25 *Geo.* II. *c.* 36, for keeping a house for dancing and music, not being licensed pursuant to the act of parliament.

To subject a party to the penalties of the stat. 25 *Geo.* II. *c.* 36, for keeping a house for illegal dancing and music, it is not necessary that the party who kept the house should take money for admission.

The defendant was a publican; and it was proved, That, on every *Monday* evening, his house was opened for the reception of company: that several persons, male and female, met there to dance; 1*s.* 6*d.* was paid for admission, not to the defendant, but to the use of a person of the name of———; who, it appeared, professed to teach dancing.

It was objected by the defendant's counsel: That to constitute the offence in the defendant within the statute, the house should have been used for the illegal purpose of music and dancing for profit to the defendant; and that if he derived no advantage or emolument from it, he was not the proper object of punishment under the act: That the person for whose benefit the

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ARCHER v. WILLINGRICE.

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the money was received, was a dancing-master. *Bellis* v. *Burghall* was cited, *ante 3 vol. 722, as deciding that this case was not within the statute.

Lord ELLENBOROUGH. It is not necessary, in order to subject a party to the penalty given by this act of parliament, that he should take money for admission. The taking of money is only evidence that the defendant is the owner of the house where the dancing has been carried on. To the case of *Bellis* v. *Burghall* I subscribe as law; but it is not like this case. It is sufficient to shew that there has been dancing publicly carried on in this house belonging to the defendant, without its being licensed by the magistrates, to entitle the plaintiff to recover the penalty.

Verdict for the plaintiff.

Park and *Hovell* for the plaintiff.

Garrow for the defendant.

July 9th.

TAYLOR v. CROKER.

In an action against the acceptor of a bill of exchange by the indorsee, it is no defence that the drawers who had drawn the bill payable to themselves, and of course indorsed it, were infants when the bill was drawn.

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ASSUMPSIT against the defendant as the acceptor, to recover the value of a bill of exchange, drawn by *Eversfield* and *Jones* on the defendant, in their own favour, by them indorsed to *Sizeland*, and by him to the plaintiff.

Plea of *non-assumpsit*.

It appeared in evidence, That at the time the bill was drawn, *Eversfield* and *Jones* were both under age: That *Eversfield* had delivered it to *Sizeland* to be discounted; and that he had misappropriated the money, by applying it to his own use. The *defendant proved a demand by *Eversfield* of the bill from the plaintiff, stating the circumstances of its having been delivered only to be discounted, and claiming it as belonging to him.

Garrow, for the defendant, contended, That the drawers having been under age when the bill was drawn, that though the bill might not be absolutely void, it was voidable; and that *Eversfield* had shewn that he so considered it, by applying for it to be delivered up; and which circumstances, he contended, made the instrument void in the hands of the holder.

Marryatt, on the same side, cited the case of a note given by a married woman; and which was held to be void in the hands of a *bona fide* holder.

Lord ELLENBOROUGH. If this action was against the drawers themselves,

themselves, that might be a good defence; as in that case the drawers, who are stated to be infants, would be before the Court, and claiming the protection which the law affords them. But though the plaintiff derives title under them, the note is not to be considered as void in his hands. Infants may make themselves liable by a promise after full age, to pay a debt to which their infancy might otherwise be a discharge: they may here have made a new promise in this case. It would injure the circulation of bills very materially, if such facts were to be inquired into. I am of opinion the amount of the bill is recoverable.

Verdict for the plaintiff.

Gibbs and *Espinasse* for the plaintiff.

Garrow and *Marryatt* for the defendant.

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HOLSTEN *v.* JUMPSON.

June 27th.

Where goods have been seized, and a demand made in writing, it is not to be taken as conclusive evidence of property; parole evidence is admissible to explain it.

TROVER for a quantity of household furniture, which had been taken by the defendant.

The principal question in the cause turned on the fact of property; the defendant contending, That the goods were the property of the plaintiff's mother, who was indebted to him; and for which debt they had been in execution.

The defendant and her mother were foreigners: they lived together; and the goods in question were taken in an apartment in their joint occupation.

To prove property in the mother, the defendant produced a paper; which was a demand by the mother of all and singular the articles of furniture, linen, &c. belonging to her, which had been seized in *Church Lane, Chelsea* (where the goods had been taken). It was signed by the mother; but the rest of the paper was not in her hand-writing.

This was contended to be conclusive evidence of the property on her part.

The plaintiff was proceeding to account for and explain the paper; which was opposed by the defendant's counsel.

Garrow, for the defendant, contended, That when a written instrument was produced, with the defendant's name subscribed, that it was evidence that the whole was the instrument of the party whose name was to it, as the subscribing the name was the adoption of the contents of the instrument: That, by the paper produced, the goods were stated to be the property of the defendant's [190]

1802. HOLSTEN *v.* JUMPSON.

dant's mother; and the object of the evidence was to shew, that they were not; and that it would be breaking in upon a solemn rule of evidence to admit parol testimony; the object of which was to alter or explain away the effect of written evidence.

Erskine contended, That the defendant's counsel having produced the paper as evidence that the goods were the property of the mother, he should be at liberty to shew the circumstances under which it was given. He admitted that he could not go into evidence to vary or contradict it; but merely to explain it. For example, the plaintiff's mother might have signed it, ignorant of the contents; or for some reason which she should be permitted to explain.

Lord ELLENBOROUGH said, That he could not take the notice to be conclusive, as to the property for which the action was brought: That if the effect of the testimony about to be given, was to give a different construction to a written instrument from what it could otherwise bear, he should reject the evidence; but this was adduced with no such view. It was merely to shew, under what circumstances the instrument was signed. The effect of receiving the evidence could not alter the rule of law. An instrument might purport to be a party's deed: was it not admissible to shew that it had been delivered as an *escrow?* He thought it admissible evidence.

It was proved, That, in fact, both the mother and the daughter had effects in the house; and that the demand in question
[*191]
was made of the effects of the mother herself; and were not those for which the action was brought.

The plaintiff had a verdict.

Erskine and *Morris* for the plaintiff.

Garrow and *Marryatt* for the defendant.

Monday, July 1st.

DELANY *v.* JONES.

An advertisement published in the newspaper concerning any person, though conveying with it an imputation injurious to the character of the party about whom it is published, is not a libel, if done *bona fide*, and with a view of obtaining information on the subject alluded to in the advertisement, by a person really interested in the discovery.

THIS was an action on the case, for a libel.

Plea of Not Guilty.

The declaration stated, That the defendant, who then carried on the business of a stationer, intending to charge the plaintiff with the crime of bigamy, and to bring him into danger of legal

punishment,

punishment, published the false and malicious libel following; that is to say,

"*Ten Guineas Reward.*

"Whereas, by a letter lately received from the *West Indies*, an event is stated to be announced by a newspaper, that can only be investigated by these means:—This is to request, that if any printer, or other person, can ascertain that *James Delany*, Esq. (the plaintiff) some years since residing at *Cork*, late lieutenant in the *North Lincoln* Militia, was married previous to nine o'clock in the morning of the 10th of *August*, 1799, they will give notice to ——— *Jones* (the defendant) No. 14, *Duke Street, St. James's*, and they shall receive the reward."

There was an *inuendo*, that the defendant meant thereby to insinuate, and to be understood, that the said plaintiff had been, and was married before the time mentioned in the advertisement, and had another wife then living; he being then married to one *Elizabeth Weston*, his present wife. [192]

The defence relied upon and given in evidence was, That this advertisement had been inserted by the authority of the plaintiff's wife, for the purpose of making a discovery which was important for her to know, namely, Whether the plaintiff had another wife living? That beside this, from the terms of the advertisement, no direct slander was conveyed; without which there could be no libel. The advertisement might be to discover an heir, the legitimacy of a person, or for such like purpose; which would not be a libel.

It was answered by *Erskine*, of counsel for the plaintiff, That, to constitute a libel, it was not necessary that the libel should be apparent to all the world. If a man sends an advertisement to a newspaper so wrapped up, that, though not intelligible to the bulk of mankind, it is so to minds more intelligent, still it was a libel; and that the libellous tendency of this advertisement could not be mistaken.

Lord ELLENBOROUGH, in summing up to the jury, said, This paper is relied upon as necessarily carrying with it the imputation that the plaintiff was guilty of bigamy. You must be of opinion that it does carry such imputation, before you can find a verdict for the plaintiff, as that meaning is necessary to make the paper a libel at all. The plaintiff's counsel contend, That you are to take into your consideration only, Whether the advertisement conveys a libellous charge against the plaintiff or not? I [193]

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DELANY *v.* JONES.

am of a different opinion: I conceive the law to be, That though that which is spoken or written may be injurious to the character of the party, yet if done *bona fide*, as with a view of investigating a fact, in which the party making it is interested in it, is not libellous. If therefore this investigation was set on foot, and this advertisement published by the plaintiff's wife, either from anxiety to know, Whether she was legally the wife of the plaintiff? or, Whether he had another wife living when he married her? though that is done through the medium of imputing bigamy to the plaintiff, it is justifiable: but in such a case, it is necessary for the defendant who publishes the libel, to shew that he published it under such authority, and with such a view. The jury are therefore first to say, Whether the advertisement imputes a charge of bigamy to the plaintiff; and if they think it does, then to inquire, whether the libel was published with a view, by the wife, of fairly finding out a fact respecting her husband, in which she was materially interested. If it was so, the publication is not a libel; and the defendant is entitled to a verdict.

The jury found a verdict for the defendant.

Erskine, *Garrow*, *Gibbs* and *Espinasse* for the plaintiff.

Park and *Marryatt* for the defendant.

MILES and another, *v.* RAWLYNS and another, Sheriff of Middlesex.

[194] THIS was an action on the case, against the defendant, as Sheriff of *Middlesex*, for a false return, in returning *nulla bona* to an execution against two persons of the names of *Brown* and *Yoxton*.

Plea of Not Guilty.

The plaintiffs proved the suing out a *test. fi. fa.* in *Michaelmas* term last, the delivery of it to the defendants, the taking goods in execution, and the return made thereto of *nulla bona*.

The defence was, That *Brown* and *Yoxton* had been bankrupts before delivery of the writ of execution to the defendant; and that of course the property belonged to the assignees.

The defendant proved an act of bankruptcy and petitioning creditor's debt in the beginning of *October*, upon which the commission was founded; which, of course, preceded the delivery of the writ to the sheriff, and thereby established their case.

The

1802.

MILES and another v. RAWLYNS and another, Sheriff of Middlesex.

The plaintiffs counsel relied in answer, That that commission was void.

This was proposed to be proved, That by shewing an act of bankruptcy had been committed prior to that on which the present commission was founded; and accordingly were then proceeding to prove such act of bankruptcy prior to that relied on, in order to defeat the existing commission.

Lord ELLENBOROUGH. I wish to know, Whether, where there [195] is a valid commission subsisting, it is to be annihilated, by shewing an antecedent petitioning creditor's debt, and an act of bankruptcy sufficient to support a valid precedent commission, without shewing that precedent commission sued out? It might be, that such petitioning creditors might never put any commission in motion. I know the course of decision has been so; but it always appeared to me to want consideration; and I wish to have it brought before the Court for further consideration; but, at all events, after shewing such an antecedent act of bankruptcy, the party impeaching the existing commission must shew a petitioning creditor's debt then legally subsisting to support a commission.

The plaintiffs counsel relied on the plaintiffs own debt, as being sufficient to support a commission at the time of the former act of bankruptcy committed; it being then due under a warrant of attorney given by the bankrupt before that time.

It was insisted by the defendants counsel, That it was not a sufficient debt on these grounds: First, That the plaintiffs had signed a judgment on that warrant of attorney, and proceeded to execution against the bankrupt, so that they had elected to proceed at law; and that they therefore could not be good petitioning creditors. Secondly, That the warrant of attorney was given for a sum of money, with a defeasance to be void, on payment of certain bills accepted for the bankrupt: That the warrant of attorney therefore constituted the debt upon which the commission was sued out, it being to secure the payment of [196] those bills accepted and drawn by the plaintiff for the account of *Brown* and *Yoxton*. Until the payment therefore of those bills by the plaintiff, no debt was created; and if *Brown* and *Yoxton* had become bankrupts, the plaintiffs could not have proved any debt under their commision, unless they had actually paid some of the bills.

Lord ELLENBOROUGH asked, If there was any case where the proceeding under the judgment, prevented the party from suing

1802.

Miles and another v. Rawlyns and another, Sheriff of Middlesex.

out a commission of bankruptcy? No answer being given, he said, The warrant of attorney appeared to him to constitute a *debitum in presenti* sufficient to support the commission; but he would reserve the point. I believe the point was never after moved.

Erskine and *Wood* for the plaintiff.

Garrow and *Gibbs* for the defendant.

July 15th.

Hills *v.* Hills*.

Where an annuity is void for a defect in the memorial, and the grantee brings an action to recover the consideration, the grantee, under a plea of set-off, may give in evidence the whole of the payments made on account of the annuity; but if any are of any more than six years standing, the plaintiff should reply the statute of limitations.

[*197]

ASSUMPSIT for money had and received.

Pleas of *non-assumpsit* and set-off; and issues on both pleas.

The plaintiff and defendant were brothers; and the plaintiff being entitled to 700*l.* as his share of his father's property in the defendant's hands, they had come to an agreement, That the defendant * should pay to the plaintiff an annuity of 84*l. per ann.* for his life.

The memorial of this annuity not having been duly registered, was void under the statute; and the plaintiff having brought an action on the annuity-deed, the defendant had pleaded that it was so void for want of a memorial: upon which the plaintiff entered a *noli prosequi;* and now brought his action to recover the consideration.

The defendant did not dispute the plaintiff's right of action; but relied on the set-off of the payments made under the annuity, as more than covering the amount of the demand, they having been paid for eleven years; and which several payments, when taken together, amounted to a sum exceeding what the plaintiff claimed, *viz.* 924*l.*

It was contended for the plaintiff, That the payment of the annuity being voluntary, and made before the annuity was set aside, that the plaintiff had a right to keep the sums so paid; and so they could not be the object of a set-off. Secondly, That even if it was the object of a set-off, the defendant could not set off more than the sums paid within six years.

Lord Ellenborough said, That as to the first objection, they were payments on both sides; and each party entitled to them as against the other. He was of opinion, That the defendant

* This is the same case with that reported in 3d *East's* Rep. by the name of *Hicks* v. *Hicks*. The true name of the case is *Hills* v. *Hills*.

was

was entitled to set off the several payments on account of the annuity.

As to the objection, That the defendant could only claim the payments made for the last six years, *which was the second objection, the defendant's counsel answered, That if notice of set-off had been given, six years only could be set off; but as a set-off here was pleaded, the plaintiff should have replied the statute of limitations to all but six years, which he had not done; but had replied generally: so that the defendant was entitled to the whole. [*198]

Lord ELLENBOROUGH, assented to the answer; and the plaintiff was nonsuited.

Erskine, *Onslow*, Serjt. and *Espinasse* for the plaintiff.

Garrow, *Gibbs*, and *Marryatt* for the defendant.

DOE on Demise HARROP, v. J. GREEN and G. GREEN.

July 15th.

In a joint ejectment, one of whom suffers judgment by default, and the other takes defence, the defendant who has let judgment go by default, is a good witness to prove the other in possession.

THIS was an action of ejectment, to recover the possession of a house in the parish of *St. James*, *Westminster*, brought by the lessor of the plaintiff, as the landlord of the premises.

J. Green, one of the defendants, suffered judgment to go by default. The other defendant pleaded to the action.

A notice was given by the lessor, on the 28th of *September*, to quit on the 25th of *March* following (being *March* the 25th, 1802); after which the ejectment was brought.

To prove that the premises were held of the *lessor of the plaintiff, and the commencement of the term, the plaintiff's counsel called *J. Green*, the defendant, who had let judgment go by default. [*199]

He was objected to, as incompetent, on the ground that, by assisting the plaintiff to recover in this action, he enabled the plaintiff to recover the mesne profits against the defendant *G. Green*, and so protected himself; as he would otherwise be solely liable, by reason of his having suffered judgment to go by default.

Lord ELLENBOROUGH said, That the verdict in this cause did not prevent the plaintiff from suing him for the mesne profits, as he had let judgment go against him. He was of opinion he therefore was an admissible witness, as the only supposed interest imputable to him, was the possibility of the plaintiff suing the present defendant only, in case he recovered in this action. This was not a direct interest; but a remote and only possible

1802. — Doe on Demise Harrop v. J. Green and G. Green.

advantage which the witness might have, and which could not render him incompetent.

It was then objected: That the notice was served on the 28th of *September*, to quit on the 25th of *March*, which was not six months notice.

Lord Ellenborough said, It clearly was: and notice on the 29th of *September*, to quit at *Lady day* following, had been held good.

Verdict for the plaintiff.

Erskine and *Espinasse* for the plaintiff.

Littledale for the defendant.

[200] *July* 16th.

The King, on the Prosecution of Allen and others, v. Lloyd.

An indictment will not lie for that which is a nuisance only to a few inhabitants of a particular place.

THIS was an indictment for a nuisance, preferred by the Society of *Clifford's Inn*.

The defendant was a tinman. The nuisance complained of by the indictment was, That, from the noise made by him in the carrying on his trade, the prosecutors were disturbed in the occupation of their chambers, and prevented from following their lawful professions.

It was proved by the prosecutors, who were attornies, that in carrying on such part of their business as required particular attention, in perusing abstracts, and other necessary parts of their profession, the noise was so considerable, that they were prevented from attending to it.

It appeared, however, on the cross-examination of the witnesses on the part of the prosecution, That the noise only affected three numbers, *viz.* 14, 15, and 16, of *Clifford's Inn*; and that by shutting the windows, the noise was in a great measure prevented.

Lord Ellenborough said, That upon this evidence the indictment could not be sustained; and that it was, if any thing, a private nuisance. It was confined to the inhabitants of three numbers of *Clifford's Inn* only; it did not even extend to the rest of the Society, and could be avoided by shutting the windows; [201] it was therefore not of sufficiently general extent to support an indictment; and he thought this indictment had been already carried on far enough.

The defendant was acquitted.

Erskine, *Garrow*, and *Const* for the prosecutors.

Park and *Marryatt* for the defendant.

SITTINGS AFTER TERM AT GUILDHALL.

DIMSDALE and others *v.* LANCHESTER.

ASSUMPSIT for money paid, had and received to the use of the defendant, with the other money counts.

The indorsee of a promissory note may maintain an action for money had and received against the maker.

Plea, *non-assumpsit.*

The case was, That the defendant having given her promissory note for 63*l.* it was paid into the hands of the plaintiffs, who were bankers; the payee having regularly indorsed it.

It was sent to the defendant by a notary, for payment. In payment of it, he received, in part, a 10*l.* note, which turned out to be a forgery; to recover the amount of which the present action was brought.

These facts were proved.

Erskine objected: That this action for money had and received could not be supported: That the payment of the plaintiffs original demand, under the defendant's note for 63*l.* in this case, was by a forged note; so that the original note of the defendant was not thereby discharged, and the plaintiffs might have declared as indorsees of it, and given notice to the defendant to produce it: That the defendant was, therefore, still liable on that note. He put the case, That the action was for goods sold, which had been paid for in a forged bill. An action for goods sold and delivered still remained: That this action was by the indorsees of the first note; and as the only dealing was through the medium of that note, there was no money of the plaintiffs had and received by the defendant. [202

Lord ELLENBOROUGH said, He thought the action was maintainable: That when a person has put his name to a promissory note, he thereby acknowledges that he has money in his hand of the payee of the note; and undertakes to pay it to whoever is legally entitled to receive it, that is to the person who shall have paid for it a good consideration; and who has thereby become the legal holder of the note.

Verdict for the plaintiffs.

Gibbs and *Giles* for the plaintiffs.

Erskine for the defendant.

SURTEES

1802.

July 16th.

SURTEES et alt. *v.* HUBBARD.

Where an assignment has been executed of property due by a third person, and the party to whom the assignment is made, for the purpose of giving notice to such third person, prepares two notices at same time, which he signs, and serves one of them on such person, if an action is afterwardsbrought by the assignees, he can give that notice in evidence which he retained, without giving a notice to produce that served on the other person.

THIS was an action for money had and received.

The action was brought by the plaintiffs, as the assignees of the ship *Lady Nelson*, to recover the amount of freight.

The plaintiffs had given a notice to the defendant of the assignment of the ship and freight to them; but no notice to produce this notice had been given to the defendant.

To prove this notice of the assignment, a witness was called for the plaintiff, who proved that he had served the defendant with a notice of the assignment; a copy of which he then produced. He swore, That the paper which he then produced, was an exact transcript of that served, was written at the same time; and that both papers were then signed by the plaintiffs.

It was objected by the defendant's counsel: That this was inadmissible in evidence, without a notice to produce that which had been served on the defendant.

It was answered, That there was no distinction between this case and that of the notice to quit, which had been deemed to be sufficient, when served in the mode in which this notice was served: that both papers were originals; and so no notice to produce that served on the defendant was necessary.

Lord ELLENBOROUGH said, He had some difficulty on the subject; as the reason of giving notice to produce any papers served on the opposite party, *was to check a person from giving in evidence what was a false copy. He could not, however, distinguish this from the case of notice to quit; and that, on the authority of that, his Lordship said he decided, though he found difficulties in it, that the notice produced might be given in evidence.

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A person of the name of *Ward* had been the owner of the ship, which had been chartered by the defendant. *Ward* had assigned over the ship, and all the freight due by *Hubbard* the defendant, to the plaintiff.

When a party indebted to another consents to pay over that money to a third person, the latter can maintain assumpsit for it.

Erskine objected: That this action being to recover that freight, should have been in the name of *Ward*, as the contract was made with him: That it being a chose in action, could not be brought by any other person; so that the present plaintiff could not support the action.

Lord ELLENBOROUGH. Choses in action generally, are not assignable.

assignable. Where a party entitled to money assigns over his interest to another, the mere act of assignment does not entitle the assignee to maintain an action for it. The debtor may refuse his assent: he may have an account against the assignor, and wish to have his set-off; but if there is any thing like an assent on the part of the holder of the money, in that case, I think, that this, which is an equitable action, is maintainable.

1802. SURTEES et alt. *v.* HUBBARD.

An assent was proved on the part of the defendant, to a certain amount; but which was covered by payments made by the defendant prior to the notice.

The plaintiff was nonsuited. [205]

Gibbs and *Nolan* for the plaintiff.

Erskine and *Giles* for the defendant.

SITTINGS BEFORE MICHAELMAS TERM*.

HEATH *v.* HUBBARD.

THIS was an action of trover, to recover the value of one-third of the ship *Fishborn*, against the defendant, who was owner of the other two-thirds.

The ship had been insured; and having been detained under the *Russian* embargo, was then abandoned to the underwriters on the 7th of *March*, 1801. A bill of sale was made to the plaintiff, by the owners in trust for the underwriters.

Several objections were made at the trial, which were reserved for the opinion of the Court. The most important of which was, Whether the bill of sale, being in trust for certain unnamed underwriters on the ship, was not void in point of law, as affording a means of covering foreign interests, and tending to defeat the provision of the statutes 26 *Geo.* 3. *c.* 60. and 34 *Geo.* 3. *c.* 68, —the ship register-acts.

The proof of the conversion was, That *Hubbard*, the defendant, had sold and assigned the whole of the ship; and so had converted the third to his own use. [206]

The plaintiff called a Mr. *Brown*, who had purchased it. He was told, That he was not bound to produce the bill of sale from

* The causes which remained untried when the circuits commenced, were tried before *Michaelmas* term, in the *King's Bench*.

Hubbard

1802.

HEATH *v.* HUBBARD.

Hubbard to him: he nevertheless consented to do it. It was produced.

It was then objected: That the subscribing witness should be called. It was admitted to be necessary; and he was called, and proved it.

Brown was then called back by the defendant's counsel; and he was asked, If he had not another deed respecting the vessel delivered to him by *Hubbard*, at the time of the execution of the bill?

He answered, That he had.

The counsel was then proceeding to ask him to the effect of it.

It was objected: That this could not be done without calling the subscribing witness to that deed.

It was answered, That this being all one transaction, and the delivery of the deeds having taken place at the same time, that, by the proof of one deed called for by the plaintiff, all the accompanying instruments were thereby made evidence.

Lord ELLENBOROUGH said, That it was certainly competent for the counsel for the defendant, by his cross-examination, to enquire, whether there was any such deed; but that he could not avail himself of it in evidence: he should prove the deed in the usual way.

[207] The defendant was not prepared to prove the deed; and it was not given in evidence.

Erskine, *Gibbs* and *Hall* for the plaintiff.

Garrow, *Giles*, and *Abbott* for the defendant.

In Trinity term following, the case came on to be argued, when the Court decided, That the bill of sale was not absolutely void; but as to the objects of the trust, which were prohibited by law, the execution of which trusts could not be enforced; but that there was no such illegality affecting the trustee himself, as would prevent the property from vesting in him in the first instance; so that he could maintain the action. 3 *East*, 129.

Nov. 2d.

CRAWFORD and others *v.* STIRLING.

A guarantee to the amount of a certain sum of money, given for a third person, cannot be set off.

ASSUMPSIT for goods sold and delivered.

Pleas, *non-assumpsit* and set-off.

The question in the case was, Whether the defendant was entitled to a set-off, under the following circumstances:—*Crawford* and Co. the plaintiffs, were manufacturers and merchants, at

at *Glasgow*, in *Scotland*; but *Andrew Mitchell*, one of the partners, resided in *London**; and conducted the business of the house there. One *Kirkpatrick*, who lived in *Liverpool*, having occasion for goods in the course of his trade, in which the defendant dealt, procured the guarantee of *Mitchell* to the *defendant, on account of the house of the plaintiffs; for which that house received an allowance of two and a half *per cent*. [*208]

Kirkpatrick obtained goods to the amount of 1,700*l*. and then became a bankrupt. *Andrew Mitchell* (on account of the house of *Crawford* and Co.) and the defendant afterwards settled an account, in which 1,000*l*. which the defendant admitted should be taken as the amount of the guarantee, was put on the credit side of the defendant's account; and balance was struck on the account so stated.

One of the *items* of the set-off, was of the sum which was the amount of the guarantee given by the plaintiffs to the defendant, for the goods furnished to *Kirkpatrick*.

It was objected: That this was a species of demand that could not be made the object of a set-off, it not being a debt; but a demand for unliquidated damages, depending upon the default of *Kirkpatrick*. Secondly, That it arose under a guarantee given by one partner, in the partnership name; which could not be done, as being out of the course of their trade.

It was answered for the defendant, as to the first part, That, by the settlement of the accounts between *Mitchell* and the defendant, in which a certain sum was stated, and admitted on one side of the account, it became a certain and liquidated sum, which might be object of a set-off. As to the second point, That the house of the plaintiffs were bound, by the agreement of their partners, to the guarantee, they receiving a benefit of two and a half *per cent*.

Lord ELLENBOROUGH said, He thought there was no foundation for the set-off claimed, as the sum claimed was unliquidated damages: That a guarantee was a contract of indemnity; it was to make good the default of another party, for whom the guarantee was given: that was not an absolute debt by the plaintiff to the defendant, but an engagement for the deficiency of *Kirkpatrick* only; it could therefore only be known to what extent the plaintiff was liable, when it was ascertained how much was paid by *Kirkpatrick*'s estate. This was therefore uncertain and unliquidated till that fact was known. With respect to the settlement [209]

ment

1802.

CRAWFORD et alt. v. STIRLING.

ment of the accounts, in which a certain sum had been put on one side of the account, on account of the guarantee, that was only stated as the amount of the guarantee, and the possible amount in the account; but it was still liable to be altered by the dividend made by *Kirkpatrick*, in diminution of the debt due by him to the defendant. To make the sum admissible as a set-off, the sum must be settled in monies numbered, which was not the case here; and was therefore inadmissible.—As to the second point, a guarantee given by one partner, in the partnership's name, unless it was in the regular line of business, could not bind the other partners; but if they afterwards adopted it, and acted on it, it should bind them.

Verdict for the plaintiff.

Garrow and *Taddy* for the plaintiff.

Erskine and *Walton* for the defendant.

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Nov. 2d.

CHATERS v. BELL and others.

When there are several indorsers of a bill, the plaintiff may declare on an indorsement by the payee to his immediate indorser, without stating the immediate ones.

THIS was an action of assumpsit by the plaintiff, as indorsee against the indorser, to recover the amount of a bill of exchange stated in the declaration to be drawn payable to *Curry*, or order; by him indorsed to the defendant; and by the defendant to the plaintiff.

There were several intermediate indorsers between *Curry* and the defendant; but those indorsements were not stated in the declaration.

Gibbs objected, for the defendant: That the plaintiff could not recover: that though the plaintiff might declare as immediate indorsee of *Curry* the payee, as on a direct indorsement to himself, he could not take out what indorsements he pleased, and state some and omit others; but was bound in declaring, as indorsee, against a preceding indorser: if he stated any indorsement of the payee, except to himself, to state all the indorsers down to the defendant, as by such means only he brought down a regular title to himself through the last indorser, and thereby render him liable.

Erskine contended, That it was unnecessary: that it was sufficient for the plaintiff to state his title as indorsee; and as the action was against the indorser, founded on an indorsement to him

him by the defendant, it was only necessary to state the indorsement by the defendant to the plaintiff; and the other indorsements might be considered, as to *that part, a surplusage, except that of the payee, which it was necessary to prove, in order to shew that the bill had been put into circulation.

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CHATERS v. BELL et alt.

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Lord ELLENBOROUGH over-ruled the objection, saying, That he thought the plaintiff might declare as he had done; but as the case was to be reserved on another part, he would reserve this*.

Erskine and *Courthope* for the plaintiff.

Gibbs for the defendant.

* This point was afterwards abandoned by Mr. *Gibbs*, when the other matter reserved came to be argued.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

KING'S BENCH,

MICHAELMAS TERM, 43 GEORGE III. 1802.

FIRST SITTINGS IN TERM AT GUILDHALL.

COLLETT *v.* Lord KEITH.

The examination of a person taken in short hand when examined as a witness, is evidence against him in an action, though he was stopped in giving his testimony, and might have added to, or explained what he had said.

TRESPASS for taking the plaintiff's ship.

The defendant had been examined as a witness at the trial of a cause of *Wilson* v. *Marryatt*. In the course of his examination, he had admitted the taking the ship in question.

His examination had been taken by a short hand writer, who had been employed to take down the trial. He was called, and examined as to what Lord *Keith* had said in giving his testimony; and which he had so taken down at the trial.

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Garrow, for the defendant, objected to its being read. He stated, That when Lord *Keith* gave his testimony respecting the taking of the ship, and was proceeding to state his reason for so doing, Lord KENYON had interrupted him, and said, "Lord *Keith* need enter into no defence to vindicate his conduct;—all the world will agree with him." He stated, that in consequence of that, the question stood sole and unexplained. He said, that the evidence of every witness who was called, ought to be free, voluntary, and with full information, of the effect which his

his testimony might have against himself: That Lord *Keith* was not apprized of the drift of the examination, or the effect which what he said might have against himself: he was therefore entrapped into this evidence, which he should have been permitted to have added to, or explained.

LE BLANC, Justice, said, He was of opinion that it was admissible: That the manner in which it had been obtained might be matter of observation to make to the jury; but if what was said bore in any way on the issue, he was bound to receive it as evidence of the fact itself.

Erskine, *Gibbs*, and *Giles* for the plaintiff.

Garrow, *Adam*, and *Park* for the defendant.

AT GUILDHALL, SITTING-DAY AFTER TERM.

RAMBERT v. COHEN.

Nov. 30th.

Where a receipt for money has been given on unstamped paper, it may be used by a witness who saw it given, to refresh his memory.

ASSUMPSIT for work and labour as a carpenter.

Plea of the General Issue.

The plaintiff proved the work done; and the charges to be fair and reasonable.

The defendant's case was, That the plaintiff had undertaken to do the work at a lower rate than he *had charged by the bill, on which the action was brought; and that the defendant had paid the whole of the demand according to the price for which he had agreed.

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The defendant's son was called as a witness: he said, That the defendant had paid to the plaintiff a sum of money for the work; which he believed was 8*l.* 2*s.* 6*d.*: that a receipt had been given for it by the plaintiff, which he saw given; but it was on an unstamped piece of paper.

Garrow, for the defendant, proposed to put the receipt into the witness's hand, for the purpose of using the piece of paper on which the receipt was written, as a memorandum to assist his memory.

Park, for the plaintiff, objected to it, as it would tend to defeat the stamp duties: That, by giving a receipt on unstamped paper, the party would have, by this means, the effect of its being stamped; besides which, it was giving that in evidence by parol, of which there was evidence in writing.

Lord

1802.

Rambert v. Cohen.

Lord Ellenborough said, That as the only matter in dispute was the naked fact of payment of the money, he rather thought the witness might be allowed so to refresh his memory. The paper produced, was not produced as evidence of itself; but it was a material memorandum, which the witness might refer to, and give parol evidence of the fact of payment; which he might do, though a receipt had been so given.

Verdict for the plaintiff.

Park and *Espinasse* for the plaintiff.

Garrow for the defendant.

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SITTINGS AFTER TERM AT WESTMINSTER.

Nov. 30th.

Molton *v.* Rogers.

The penalty under the game certificate act for not producing a licence when lawfully required, is not complete by the refusal to produce it, unless the party refuses, on request, to tell his christian and surname, and the place of his residence.

THIS was an action of debt, on the stat. 25 *Geo.* 3. c. 50. sect. 15., brought to recover the penalty for not producing the certificate entitling the party to kill game, as required by that statute.

It is by that statute enacted, "That if any person shall be found using a dog, gun, &c. or other engine, for the destruction of game, by any other person who has obtained a certificate, it shall be lawful for any person producing such certificate as is required by the act, to demand and require the person so using such gun, to produce and shew the certificate issued to him for the purpose aforesaid; and every such person shall, upon such demand or requisition, produce such certificate to the person demanding the same; and permit the same to be inspected accordingly: and if any such person shall wilfully refuse to produce or shew his certificate, or not having produced or shewn it, shall refuse, on demand thereof, to give his christian and surname, and place of his residence; or shall give any false or fictitious name or residence, he shall forfeit ten pounds."

The evidence was, That a gentleman of the name of *Slater*, [216] who was a qualified person, was out sporting with two greyhounds: that he was joined by *Rogers*, the defendant, whose father was qualified: that *Rogers*, when he came into the field and joined him, had with him a greyhound which belonged to his father: that the dog of *Rogers*, and one of *Slater's*, found and

1802.

MOLTON v. ROGERS.

and killed a hare: that *Slater* had sent and borrowed the dog of the defendant's father, in order to try him.

Erskine contended, That by the presence of *Slater*, and hunting in his company, the defendant *Rogers*, though unqualified, was protected: that the law put that trust into a person qualified, that he would not abuse his qualification; and therefore, while he was following that which the law allowed, the mere joining of an unqualified person, and partaking of the sport, was no offence by such person.

Erskine further contended, That the mere act of not producing the certificate, was not of itself an offence: that by the words of the act, the penalty did not attach until the person who refused to produce the certificate, had also refused to tell his christian and surname, and the place of his residence.

Garrow, for the plaintiff, relied, That the offences were distinct: the one for not producing his certificate; the other for not telling his name, &c.

Lord ELLENBOROUGH read the words of the statute:- "If any such person shall wilfully refuse to produce and shew a certificate, or not having produced and shewn such certificate, shall refuse, on demand, to give his christian and surname, and place of residence, every such person so offending, shall forfeit a sum of fifty pounds." [217]

An unqualified and unlicensed person may join in the sport with a person lawfully entitled to kill game, if he merely joins in the sport, and is not himself a principal, or using his own dogs.

His lordship then said, That the offences were not distinct; but that after a refusal to produce the certificate, it was necessary to ask for the party's surname and christian name, and his place of abode; the act intending that to be the medium of discovery of the person sporting without a certificate. Every man was not to be considered as using a dog, who merely participated in the sport: if that was so, no man, unless he was qualified, could join in the sport of the field, nor bring a servant with him; he must be himself a principal, such as the owner of the dogs. The question therefore was, Was this a loan of the dog to the qualified person; and was the defendant only partaking of the sport? If it was so, though the dog might be his, he was not liable to a penalty. His lordship then added, I am fortified in this construction of the act, by observing, that by the act, only 20*l.* is given for not taking out a certificate; whereas the penalty, as it is contended for, for not producing a certificate when demanded, is 50*l.* A man who has not a certificate, and who of course cannot produce one, would be subjected to a penalty of 50*l.*

1802. 50*l.* though the not taking it out, subjects him only to 20*l.*; which seems to be absurd.

MOLTON v. ROGERS.

Verdict for the defendant.

Garrow and *Smith* for the plaintiff.

Erskine and *Wigley* for the defendant.

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HARRISON *v.* STRATTON.

In an action for slanderous words, imputing dishonesty to the plaintiff, the declaration is not supported by proving words which may import such a meaning, but are equivocal, and may have a different import.

THIS was an action for slanderous words.

Plea of Not Guilty.

The plaintiff was a surveyor; and the defendant a tinman and brazier.

The defendant had set up a hot kitchen, with the other apparatus, for a Mr. *Angerstein;* for which he had charged 90*l.* The payment had been disputed, as being a considerable overcharge. The defendant brought an action to recover the amount; and the cause was tried at *Guildhall.*

Harrison, the present plaintiff, had been employed by Mr. *Angerstein* as a surveyor, to estimate the value, in order to ascertain how much ought to be paid; and to give evidence at the trial, as a witness, of the value he put on the work; which was 60*l.* The cause was tried; and the plaintiff was examined as a witness, on behalf of Mr. *Angerstein.* The defendant recovered 90*l.* being the whole of his demand.

The defendant afterwards speaking of *Harrison,* said, "*Harrison* is a scoundrel. If I would have found him an oven for nothing, and had given him after the rate of 20*l.* *per cent.* upon the amount of the charges for the work and materials, he would have passed my account."

These were the words laid in the declaration, as imputing dishonesty in the plaintiff in the course of his business and profession as a surveyor.

[219] The first witness called for the plaintiff, proved the words, "*Harrison* is a scoundrel; and if I had allowed 20*l.* *per cent.* he would have passed my account." The second witness proved the words, "*Harrison* is a scoundrel; and if I had deducted 20*l.* *per cent.* he would have passed my account." These were the only witnesses called by the plaintiff.

Upon those words being so proved, Lord ELLENBOROUGH said, He thought the plaintiff must be called. He said, that on the

the face of the record, the words seemed to him to be scarcely actionable; they imputed rather an inclination to the plaintiff to do that which was wrong, than the actual doing of it; and that imputing evil inclinations to a man, which were never brought into action, was not actionable. Words to be actionable should be unequivocally so, and be proved as laid; but that as the words were proved, they did not support the declaration. The words of the declaration were, "If he would give me 20*l. per cent.*;" that might mean something to himself, by which he would be himself benefited, to the prejudice of his employer; but the words proved were, "If he would *allow*, or if he would *deduct* 20*l. per cent.*" These words might import an allowance or deduction from the plaintiff's bill, for the benefit of his employer; and were of a different meaning and import.

The plaintiff was nonsuited.

Garrow and *Jervis* for the plaintiff.

Erskine for the defendant.

WILLIAMS *v.* WALSBY.

[220]

A general authority from one of several assignees of a bankrupt's estate to the others to act for him, and use his name, is not sufficient to enable the others to execute a release by deed; there must be a special authority for that purpose.

THIS was an action brought by the plaintiff, who was a joint surety with the defendant, for one *Oliver Toulmin*, a bankrupt, to recover a contribution for money paid on his account; and for which the defendant had given a bond of indemnity.

The defendant's plea, among others, was this: that one of the assignees of *Toulmin*, with the consent of the others, had released, &c.

There were three assignees of *Toulmin*'s estate.

The defendant was about to give parol evidence of the fact; when it was objected by the plaintiff's counsel: that as the defendant claimed a discharge by deed from one of the assignees, that such could not be done by that evidence, as one assignee could not, by deed, bind another, without an authority in writing, under seal; and *Harrison* v. *Jackson*, 7 *Term Rep*. 207. was cited.

Lord ELLENBOROUGH said, That he thought the evidence was admissible as offered; as perhaps it might have been done by one in the presence and with the concurrence of the others.

The counsel for the defendant cited *Ball* v. *Dunsterville*, 4 *Term Rep*. 313; and Sir *W. Jones*, 268.

The release was then produced, and the subscribing witness to it

1802.

WILLIAMS v. WALSBY.

[*221]

it called. He proved the execution of it by a Mr. *Urquhart*, one of the assignees, in the presence and with the assent of a Mr. *R. Toulmin*, another of the assignees; but he said, that he had never seen, nor had any communication with the third assignee.

Mr. *R. Toulmin* was then called, who said, That he had consented to the giving of the release. Being asked, if he had ever communicated with the third assignee on the business? he said, that that assignee had given to *Urquhart* and him a general authority to act for him, as that assignee resided in the country, and could not attend to the concerns of the estate.

Upon this evidence Lord ELLENBOROUGH said, That it was not sufficient to support the release: That there should have been a special authority from the third assignee to execute the deed; and that the general authority given by him to the other assignees to act for him, did not warrant what had here been done.

Verdict for the plaintiff.

Gibbs, *Wood*, and *Wigley* for the plaintiff.

Erskine and *Burrough* for the defendant.

CAMFIELD *v.* GILBERT.

In an action for money had and received, to recover back a deposit on a sale, on the ground of a defect of title, the party bringing the action must prove the title bad; and it shall not be sufficient to shew that the title has been deemed insufficient by conveyancers, who have been employed to advise upon it.

ASSUMPSIT for money had and received, with the other common money counts.

Plea of *non-assumpsit*.

The action was brought to recover the sum of 50*l.* which was the deposit paid by the plaintiff, on the purchase of an estate in *Kent*, contracted to *be sold by the defendant to the plaintiff; the plaintiff contending, that the title was bad; and that he was entitled to recover his deposit.

Gibbs, counsel for the plaintiff, put it to Lord ELLENBOROUGH, for his opinion as to his right to recover: That opinions of different conveyancers had been taken on the title before the completing of the purchase, who were of opinion, that the title was defective, and ought not to be taken by the plaintiff; and then asked, whether it might not be sufficient for him to rely on the fact of such conveyancers advising the party not to complete the purchase? or, whether it was necessary for him, on the part of the plaintiff, to go into the title, to shew that it was defective, in

[*222]

order to entitle him to recover the deposit, as paid on a bad and defective title.

Lord ELLENBOROUGH said, The plaintiff's right to recover the money deposited, depended on the defect of the title of the defendant

fendant to the premisses, which he had contracted to sell; and unless it was a bad title, he had no claim to recover. It would be therefore necessary for him to shew that the title was bad: this being doubtful in point of law, the facts were upon a case as to that reserved*.

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CAMFIELD v. GILBERT.

*Gibbs then stated, That the action was for money had and received, and money paid, &c.: That, independent of the deposit, considerable sums had been expended by the plaintiff in taking the opinion of conveyancers, and investigating the title; which sums he contended he was entitled to recover, and to be added to the verdict for the deposit, under the count for money paid, &c.

Under the general count for money paid, the buyer of a property shall not recover the expences of investigating the title, if it afterwards turns out to be bad.

Lord ELLENBOROUGH said, He thought that that could not be called money paid, laid out, and expended to the defendant's use, which the plaintiff had expended for his own satisfaction, as to the title which he was about to take; but that, at all events, if any thing could be so recovered, it should be on a special count, and framed according to the fact. Whether this could be so framed he would not say; but that on the general count for money paid, the plaintiff could not recover it.

[*223]

This was also reserved.

Gibbs and *Wigley* for the plaintiff.

Erskine, *Garrow*, and *Espinasse* for the defendant.

* This case came on to be argued in the Easter Term following, when the Court decided, that the defendant had a good title to the premises; and he had judgment accordingly. Vide 3 *East*'s Rep. *East*, 43 *Geo.* III.

GLASSINGTON, Assignee of DICKIE, v. RAWLINS and others.

[224]

THIS was an action of trespass against the defendants, as sheriff of *Middlesex*, for taking the goods of the bankrupt under an execution, subsequent to the act of bankruptcy.

There must be a valid, subsisting, and complete act of bankruptcy when the commission is sued out; it cannot be supported by relation to a preceding act of bankruptcy, but which was not complete when the commission was sued out.

The act of bankruptcy was lying in gaol for two months. The plaintiff proved the arrest of *Dickie*, which took place on the 14th of *October*; the commission was sued out the 5th of *December* following.

It was objected; That this was not a sufficient act of bankruptcy, the two months not having expired when the commission was sued out.

It was answered, That the bankrupt had lain in gaol after the 5th of *December*, and became so by relation to the time of his first

1802.

GLASSINGTON, Assignee of DICKIE, v. RAWLINS and others.

first arrest; so that he having afterwards lain in prison beyond the two months, he became a bankrupt by relation, in fact, from the 5th of *October*.

Mr. Justice LAWRENCE ruled, That the commission could not be supported: That the bankrupt must be legally so at the time when the commission was sued out; so that there should be a legal and subsisting act of bankruptcy at the time when the commission was sued out, or it could not be supported. The question [225] was, was there a legal act of bankruptcy on the 5th of *December*? There was not an act of bankruptcy then committed by *Dickie*; so that the commission was not a legal one.

The plaintiff was nonsuited.

Erskine, *Gibbs*, and *Lawes* for the plaintiff.

Garrow and *Park* for the defendant.

Vide 3 *East*'s Rep. 407.

This case came on afterwards before the Court of *King's Bench*, on a motion for a new trial, on the ground that, in fact two months, or fifty-six days, had expired when the commission was sued out: which calculation was made by reckoning the day of the arrest inclusive. This point was not made at the trial; and it seemed to be acquiesced in then, that two months had not expired; and the objection was answered as above. Mr. Justice LAWRENCE delivered the opinion of the Court, that the day of the arrest should be inclusive; and that a legal act of bankruptcy was committed on the 5th of *December*.

SITTINGS AFTER TERM IN THE COURT OF KING'S BENCH.

REX *v.* LEWIS and others.

A witness cannot be asked a question which tends to disgrace or degrade him.

THIS was an indictment against the defendants for an assault. The prosecutor was a person of the name of *Batterfield*, who was a common informer, and a man of a suspicious character.

*In the course of his cross-examination by the counsel for the [*226] defendant, he was asked, if he had not been in the house of correction, in *Sussex*?

Lord ELLENBOROUGH interposed and said, That that question should not be asked: That it had been formerly settled by the Judges, among whom were Chief Justice TREBY and Mr. Justice POWELL, both very great lawyers, that a witness was not bound to answer any question, the object of which was to degrade, or render him infamous. His Lordship said, That he thought the rule ought to be adhered to, as it would be an injury to the administration

1802.

REX v. LEWIS and others.

ministration of justice, if persons who came to do their duty to the public, might be subjected to improper investigation.

The witness was not permitted to be examined.

The defendants were acquitted.

Garrow and ——— for the plaintiff.

Erskine, *Knapp*, and *Watson* for the defendants.

SITTINGS AFTER TERM AT GUILDHALL.

LEACH *v.* BUCHANAN.

If a party on a bill, on being asked, if it is his own hand-writing, answers, that it is, and will be duly paid, he cannot afterwards set up a defence of forgery of his name, for he has accredited the bill, and induced another to take it.

ASSUMPSIT on a bill of exchange for 200*l.* drawn by one *James M'Connell*, in his own favour, on the defendant, and accepted by him. *M'Connell* indorsed it to *Mawley*; and he indorsed it to the plaintiff.

*The plaintiff proved the hand-writing of *M'Connell* the drawer, and of the indorsers. The evidence, as to the acceptance, was by a witness, who stated, that the plaintiff, before he took the bill, not having a very perfect knowledge of the defendant's hand-writing, had sent the witness with the bill to him, to ask him if the acceptance was his hand-writing. The witness asked him if it was so, when he answered, it was; and that it would be duly paid.

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Another witness proved to the same effect.

It was stated by *Garrow*, of counsel for the defendant, as his defence, That the bill was a forgery by *M'Connell*, who was at that time in prison under a charge of a similar nature: That he was prepared to go into evidence to establish the fact, that the hand-writing was not the defendant's.

Lord ELLENBOROUGH said, That if the counsel wished to go into the evidence he had stated, he would admit it, as public justice might require an example to be made; but that after the evidence which had been given by the plaintiff respecting the acceptance, unless it was totally discredited, it could not entitle the defendant to a verdict. The case, as it then stood, did not rest on the acceptance being a forgery, or not. It might not be the defendant's hand-writing; and he might prove that it was not so by witnesses; and still the plaintiff be entitled to recover: for before the plaintiff took it, he sent the bill to the defendant; and upon the bill being offered to him, and being asked if the acceptance was not his, he answered in the affirmative, That it

was.

1802.

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was. If he so accredited the bill, and induced a person to take it, he should hold him liable for the payment of it.

Verdict for the plaintiff.

Erskine and *Espinasse* for the plaintiff.

Garrow for the defendant.

HENRY *v.* ADEY.

In an action on a foreign judgment, it is not sufficient to prove the hand-writing of the Judge subscribed to the judgment; the seal of the colony abroad must be proved.

ASSUMPSIT for money had and received, with the common money counts.

The action was brought to recover the amount of a judgment obtained by the plaintiff against the defendant, in the island of *Grenada*, in the *West Indies*.

To prove their case, the plaintiff's counsel produced a paper, which they stated to be a copy of the judgment obtained in the *West Indies:* it was under seal, and signed by the Chief Justice of the island; and then proposed to give it in evidence, upon proving the hand-writing of the Judge.

It was objected: That that evidence would be insufficient without proof of the seal: That the instrument derived all its validity from its being an authenticated instrument, under the seal of the island; without which, it was not such an instrument as could be received as of itself sufficient to establish a debt.

It was answered by the plaintiff's counsel, That proving the
[229] hand-writing of the Judge, had the effect of authenticating the seal; but that it was of itself sufficient evidence of a judgment in that court, of which the Judge's name was to it.

Lord ELLENBOROUGH ruled, That as the instrument derived its authenticity from the seal, it was necessary to prove that the seal was the seal of the island; and that proof of the Judge's hand-writing was not sufficient.

The plaintiff was nonsuited.

Gibbs and *Scarlett* for the plaintiff.

Erskine for the defendant.

SECOND

1802.

SECOND SITTINGS AFTER TERM IN THE KING'S BENCH.

DAVEY *v.* CHAMBERLAIN and another.

Dec. 18th.

In an action against two, for negligently driving a chaise, if the two defendants have hired it jointly, and were jointly in the possession of it, both are liable for the accident. *Aliter*, If it belonged to one only, and the other was merely a passenger.

THIS was an action on the case, for negligently driving a chaise, by which the plaintiff's horse was killed.

Plea of Not Guilty by both defendants.

The accident was proved to have taken place on the road to *Wandsworth*, by a one-horse chaise (in which both defendants were then riding; and which, at the time of the accident, was on the wrong side of the road) being driven against the plaintiff's horse, by which he was killed.

The two defendants were proved to have been together in the chaise when the accident happened; *but *Chamberlain*, one of the defendants, was sitting in the chaise smoking; and it was driven by the other.

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Erskine, for the defendant, put it to Lord ELLENBOROUGH, Whether he was not entitled to have a verdict taken for *Chamberlain*, professing his view to be, that he might use his testimony in favour of the other defendant.

The ground of this application was, That no verdict ought to pass against *Chamberlain*, the injury having proceeded from the ignorance or unskilfulness of the other defendant, who was the person driving the chaise, and in whose care and under whose management it then was,—and not by the means of a person who was perfectly passive, and who took no part in the management and direction of the horse.

Lord ELLENBOROUGH said, That if a person, driving his own carriage, took in another person into it as a passenger, such person could not be subjected to an action, in case of any misconduct in the driving by the proprietor of the carriage, as he had no care nor concern with the carriage; but if two persons were jointly concerned in the carriage, as if both had hired it together, he thought the care of the King's subjects required, that both should be answerable for any accident arising from the misconduct of either in the driving of the carriage, while it was so in their joint care.

The fact turned out to be, That the chaise in question had

been

been hired by both the defendants; and a verdict passed against both accordingly.

Garrow and *Lawes* for the plaintiff.

Erskine and *Gibbs* for the defendants.

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COARE *v.* GIBLET.

When the grantee of an annuity pays the purchase money on a particular day into a banker's hands, in the joint names of his attorney and the grantor, to be paid over to the grantor on the execution of a particular deed, and it is done ~~at a sub~~sequent day the memorial properly states the payment as made on the latter day.

THIS was an action of debt on a bond, conditioned for securing the payment of an annuity.

The annuity was a joint one of the defendant's, one *Daniel Smith*, and four other persons mentioned in the condition.

There were several pleas and issues thereon. The fourth was, That the said sum of 1400*l.* in the condition of the written obligation mentioned and alleged to have been paid by the plaintiff to the use of the several parties (grantors of the annuity, as stated in the memorial) was not paid by the said plaintiff to and for the use of the said six persons.

The memorial stated a bond on the 24th of *December*, 1796, which recited the grant of an annuity for the sum of 1400*l.* which was that day paid by the plaintiff to one *Daniel Smith*, to and for the use of the grantors, six in number.

The bond was dated the 24th of *December*. On that day, *Coare*, *Daniel Smith*, and the witness, went to the bankers of *Coare*. *Coare* got 1400*l.* in notes; and gave them to *Daniel Smith*, in payment of the consideration of the annuity. *Smith* then placed the money in the same bankers' hands, in the name of himself and *Lowe* (*Coare*'s attorney) until the deeds were executed. This was in pursuance of an agreement, as the other parties had not executed.

[232] An accountable receipt was taken in the joint names of *Daniel Smith* and *Lowe*, in the following words:—" Received, the 24th day of *December*, 1796, of Mr. *Daniel Smith* and Mr. *John Lowe*, one thousand four hundred pounds on account, to account for on demand."

(Signed by the bankers.)

The defendant, who had not executed before, executed the bond on the following day, the 25th; and on the 26th of *December*, all the deeds being then completed and executed by all the parties, *Lowe* (*Coare*'s attorney) went with *Daniel Smith* to the bankers where the money had been paid in, when *Daniel Smith* received the whole of the 1400*l.* and gave up the receipt.

It

It was objected by the defendant's counsel: That this issue should be found for the defendant: That the annuity act required, in the most express terms, the name of the person by whom the money was paid to be set out: That the issue was, that the money was paid by *Coare;* whereas he had made the payment on the 24th, by his draft on his banker; and the actual payment was not made till the 26th, when it was made, not by *Coare*, but by *Lowe*, his attorney.

1802.

COARE v. GIBLET.

It was answered, That, on the 24th, the plaintiff had parted with all dominion over his money; and having from that time no controul over it, it was in fact a payment by himself on that day.

Lord ELLENBOROUGH said, As to the issue of Whether there was a payment on the 26th to *Daniel Smith*, to the use of himself and the other grantees, I am of opinion, that the conditional payment, made on the 24th of *December*, being then absolute, and that being to *Daniel Smith*, for his own use and that of the others, I think that it must be deemed a payment on that day, in the terms of the issue.

[233]

It was strongly urged by *Gibbs*, that to make this a payment by the plaintiff within the annuity act, it was essential, under the determinations which had taken place, that he should be present; whereas all that took place on this *Monday*, was Mr. *Lowe*, the attorney for *Coare*, indorsing, on the bankers' accountable receipt, an order to pay the money to *Daniel Smith*.

Lord ELLENBOROUGH said, That he must look to the issue as it stood on the record; and he was of the opinion he had just delivered; but would take a note of it, if Mr. *Gibbs* chose to move it.

Park and *Holroyd* for the plaintiff.

Erskine, *Garrow*, and *Reader* for the defendant.

Vide 3 *East's* Rep.

ROBSON and another, Assignees of BLAKEY v. KEMP and another.

ASSUMPSIT by the assignees of *Blakey*, a bankrupt, for money had and received by the defendant, subsequent to an act of bankruptcy committed by him.

This money was the produce of a cargo of coals, *which had been

The declarations of a bankrupt as to any particular matter or deed which may constitute an act of bankruptcy, if made after the deed done, are not evidence.

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1802.

ROBSON and another, Assignees of BLAKEY, *v.* KEMP and another.

been sold by and paid over to the defendant as factor, by the purchaser. The plaintiff attempted to prove an act of bankruptcy committed on the 12th of *October*, 1801.

The act of bankruptcy relied on was, The execution of a fraudulent assignment, by deed, of a ship, by the bankrupt to his son.

A witness was called to give evidence of a conversation between the father and his son respecting the transaction, in order to prove the fraud; but it appeared to have taken place after the execution of the deed.

This was objected to: That the fraudulent assignment by deed being an act of bankruptcy, it was making the declarations of the bankrupt himself evidence to establish an act of bankruptcy, by proving the deed fraudulent.

Lord ELLENBOROUGH said, Where the declaration of the bankrupt is part of the *res gesta*, though it may shew the intention of the act, and thereby constitute an act of bankruptcy, it may be evidence (as is the common case of a bankrupt going out of the way to avoid an arrest, in which his declarations, as to the view with which he absented himself, are certainly evidence); so, if the declarations of the bankrupt have been before the act, they may shew with what intention it was done; and it would be evidence. But declarations and conversations taking place subsequent to the execution of the deed and the commission of the act, which constitute an act of bankruptcy, I think are not admissible.

[235] To prove that the assignment from the father to the son was fraudulent, it was suggested, That the nominal consideration for the purchase of the ship, which was 3000*l.* was not paid, but was merely a colourable consideration; and for that reason, fraudulent: and it was proposed to prove that such was the case, by shewing that the son had executed a security back to the father for 2250*l.* part of the nominal consideration supposed to be paid by him to the father.

To prove this, Mr. *Ashfield*, an attorney, was called: he stated, That he was attorney for both father and son; and that they had employed him to prepare a deed from the father to the son; and to see it executed.

An attorney employed by consent of two parties in preparing a deed from one to the other, cannot be examined as to what he so became informed of in the preparing the deed, when the action is brought by the assignees of one against the other, suggesting fraud in the deed.

His testimony (on his own suggestion) was objected to by the

defendants'

defendants' counsel, as being a communication from his clients to him; and which ought not to be disclosed. 1802.

It was answered, That he was attorney for *Blakey*, the father, whose assignees were the plaintiffs; and that they had a right to examine him as to it.

ROBSON and another, Assignees of BLAKEY, *v.* KEMP and another.

Per Lord ELLENBOROUGH. He is also attorney for the younger *Blakey*, whose interests are to be affected by the evidence. I do not think he is bound to disclose any matter of which he has so obtained knowledge, in the character of attorney, by reason of the communication which took place between his client and another person, though that person also employed him as his attorney, *pro hac vice;* but the evidence of the deed itself stands on a different footing. An attorney, from his situation, is bound to prove the execution of a deed; that is a fact [236] no way connected with any information obtained in his character of attorney. I therefore think he may be examined as to that fact; and also as to the contents of the deed itself, in case it has been lost.

He was accordingly examined to that effect.

The cargo in question was proved to have come to the defendant's possession in the character of factor, on the 21st of *October*, 1801; and to have been sold on the 26th. The money was not received till some time afterwards. It was admitted, That an unequivocal act of bankruptcy was committed on the 26th of *October*. The plaintiff's counsel contended, That the money being received subsequent to that period, they had a right to recover it back. It was admitted that a sum, exceeding the value of the cargo, was due to the defendant.

Lord ELLENBOROUGH said, He thought the defendant became lawfully possessed of the coals on the 21st, before there was any act of bankruptcy committed: he was in the course of disposing of them when *Blakey* became a bankrupt; and he had a right to proceed with the sale, to receive the money, and to hold it in payment of his own balance.

Verdict for the defendants; *Gibbs* desiring his Lordship to reserve the two first points.

Gibbs, *Marryatt*, and *Giles* for the plaintiffs.

Erskine, *Park*, and *Cassels* for the defendants.

1802.

SITTINGS AFTER TERM IN THE COMMON PLEAS AT WESTMINSTER.

Dec. 4th.

BROMLEY *v.* WALLACE.

The misconduct, neglect, or infidelity of the husband cannot be set up as a defence for the infidelity of the wife, in an action for crim. con.

THIS was an action for criminal conversation with the plaintiff's wife.

Plea of Not Guilty.

The plaintiff and defendant were both surgeons in the navy. The plaintiff proved his marriage, and the seduction of his wife; and there rested his case.

Lens, Serjt. for the defendant, stated his defence to be, That the plaintiff had so conducted himself towards his wife, that he was not entitled to any damages, or perhaps to be nonsuited: That the action was founded on the injury which the plaintiff sustained from the loss of the society and comfort of his wife: That here the plaintiff had sustained no such loss, as he had shewn the greatest indifference and want of affection to her: That, in proof of this, he should shew, that while she lay dangerously ill at *Yarmouth* for five weeks, and the ship to which he belonged lay in *Yarmouth Roads*, he landed almost daily from the ship, and was at the door where his wife was then confined, without visiting her, or shewing any manner of concern, anxiety, or regard for her: That during the same time he contracted the venereal distemper; and lastly, That during his wife's illness, he
[238] had misconducted himself with the maid-servant of his family. Of these facts he gave some evidence; but not to the extent stated in his opening.

Lord ALVANLEY, in summing up to the jury, said, That what the defendant's counsel had stated, went to the damages only: That he was aware, the late Lord KENYON had laid down a different doctrine; and had held that such evidence went to the ground of the action itself: he thought differently. He was of opinion, that the infidelity or misconduct of the husband could never be set up as a legal defence to the adultery of the wife: that alone which struck him as furnishing any defence was, where the husband was accessary to his own dishonour; he could not then complain of an injury which he had brought on himself, and had consented to; but that the wife had been injured

by

by the husband's misconduct, could not warrant her in injuring him in that way, which was the keenest of all injuries. He therefore directed the jury to consider the evidence as going in mitigation of the damages only, and not as furnishing an answer to the action, or as entitling the defendant to a verdict. 1802. BROMLEY v. WALLACE

Verdict 200*l.* damages.

Shepherd, Serjt. and *Marryatt* for the plaintiff.

Lens, Serjt. and ——— for the defendant.

Vide *Wyndham* v. *ux. Wycombe*, *ante* vol. iv.—and the case of *Strutt* v. the Marquis of *Blandford*, there cited.

SITTINGS AFTER TERM AT GUILDHALL, IN THE COMMON PLEAS. [239]

MANNERS *q. t.* v. POSTAN.

When an instrument, executed in the presence of a subscribing witness, is offered in evidence, whether in chief in the cause against the defendant, or collaterally, it must be proved by the subscribing witness; nor shall the admission of the execution of it, by the party who executed it, be received.

THIS was an action of debt, on the statute of 12th *Ann*, for the penalties under that statute, for taking usurious interest.

Plea of the General Issue.

In all the counts, the usury was laid, "That the defendant took and accepted from one *Richard Lowe* the sum of 5*l.* for forbearing and giving day of payment for 50*l.* lent by the defendant to the said *Richard Lowe*, from the 15th of *April* to the 5th of *August*, which exceeded," &c.

The case in evidence was, That the plaintiff being indebted to one *Dance* in 111*l.* gave his warrant of attorney for it; and *Lowe*, as a collateral security, gave his note for that sum, payable to *Dance*; that *Dance* indorsed this bill to the defendant; so that there was no debt due from *Lowe* to the plaintiff, but by reason of the note so indorsed to the defendant, on which *Lowe*'s name appeared as the maker.

This note became due on the 15th of *April*. On the 13th, *Lowe* came to the defendant's son, who was his attorney, to ask time for payment. It was agreed, that 61*l.* should be then paid; and a warrant of attorney given for the remainder. *Lowe* paid down a sum of money on the table, as for the sum of 61*l.*; [240] executed the warrant of attorney, payable in three months, for the

1802.

MANNERS q.t. v. POSTAN.

the remaining 50*l.*; and went away. After he was gone, it was discovered that he had made a mistake of 5*l.* The defendant's attorney sent his clerk to *Lowe*, with the money paid, and another warrant of attorney, with orders to return the money to *Lowe*, in case he was unwilling to have the matter settled, by giving another warrant of attorney, rectifying the mistake. When the clerk came to *Lowe*, he stated to him the mistake. *Lowe* at first hesitated; but afterwards agreed to allow it; and that a new warrant of attorney was to be executed for 55*l.* in place of that for 50*l.*

Lowe was the witness by whom the plaintiff's case was proved; and he stated, That the 5*l.* was an act of extortion done to cover the usury, and a pretext to get the 5*l.* To prove that part of the case, the warrant of attorney for 55*l.* was put into his hand; and he was asked, If he had executed it. It was witnessed by *Gale*, the clerk to *Postan*.

It was objected: That this evidence was inadmissible: That no written instrument should be given in evidence without calling the subscribing witness; or where there was an admission by the party himself, against whom it was produced, that it was his deed.

It was answered, That whatever might be the rule when the action was against the party himself who executed the instrument, it did not hold when the instrument was not the foundation of the action itself; but to be given collaterally in evidence. It was stated, that it had been so ruled at *Nisi Prius*.

[241] Lord ALVANLEY said, That he thought he could not admit the warrant of attorney to be used in evidence, unless the subscribing witness was called: That the rule was founded on the principle, that there should be an investigation from the subscribing witness of what took place at the time of the execution of the instrument: That the rule was not, in his opinion, to be confined to cases, when the instrument in question was the ground of the action; but also when it was used in evidence collaterally.

The subscribing witness was called. He proved the facts above stated, in contradiction to the evidence given by *Lowe*.

A count in debt for usury, stating it to be committed in a loan from *A.* to *B.* is supported by shewing that *B.* was indebted to *A.* as the maker of a note, of which *A.* was the indorsee; and on its becoming due, that *A.* gave further time for the payment of it.

When the plaintiff closed his case, the counsel for the defendant objected: That the plaintiff should be called: That this being an action for usury, the contract should be accurately stated:

stated: That in every count of the declaration, the transaction was laid as money lent by *Postan* the defendant, to *Lowe*: That there was no loan of money from *Postan*; *Lowe* had only become a security for *Manners*'s debt to the defendant, by reason of the indorsement of *Manners*'s note. This therefore was not the contract stated in the declaration.

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MANNERS q.t. v. POSTAN.

It was answered by the plaintiff's counsel, That by giving the note for 111*l.* *Lowe* became a debtor to *Postan*: That when, in *April*, it became payable, if the ceremony had been gone through, of *Lowe*'s paying the money to *Postan*, and *Postan* had then handed back 50*l.* or 55*l.* to *Lowe*, then it would clearly be a loan: That this transaction was no more than that, as the defendant had suffered it to remain in his hands, and so was a [242] loan: That as in an action for money lent, this note could be given in evidence, it was to be considered as money lent, and corresponded with the count.

Lord ALVANLEY said, He would reserve that point.

Verdict for the plaintiff, subjected to the Court.

Marshall, Serjt. and *Wigley* for the plaintiff.

Shepherd, *Best*, Serjt. and *Espinasse* for the defendant.

This latter point was afterwards made, on a motion for a nonsuit in the Common Pleas; but the Court held, that the evidence supported the count. Vide 3 *Bos.* and *Pull.* 343.

MACBRIDE v. MACBRIDE.

How far a witness may be examined as to matters tending to disgrace or degrade him.

THIS was an action of *assumpsit*, to recover several *items* of demand.

To prove part of the demand, a woman was called as a witness.

It was suggested, that she lived in a state of concubinage with the plaintiff.

Best, Serjt. was proceeding to examine as to that point, when

Lord ALVANLEY interposed, and said, That as evidence to the effect proposed to be gone into had been objected to in another Court, he would have it understood, how far he would allow such [243] investigation to go. He thought questions as to general conduct might be asked; but not such as went immediately to degrade the witness: he would therefore allow it to be asked, whether she was married, as she might be married to the plaintiff. But having said that she was not, he would not allow it to be asked, Whether she slept

1802.

MACBRIDE v. MACBRIDE.

slept with him? His Lordship then added, I do not go so far as others may: I will not say that a witness shall not be asked to what may tend to disparage him: that would prevent an investigation into the character of the witness, which it may be often of importance to ascertain. I think those questions only should not be asked which have a direct and immediate effect to disgrace or disparage the witness.

Cockell, Serjt. and *Lawes* for the plaintiff.

Best, Serjt. for the defendant.

LEEDS *v.* WRIGHT.

Where goods have been ordered by an agent, who has a power of disposing of them as he thinks fit, for his principal's benefit, if they come to his possession, though not to his principals, they cannot be stopped *in transitu*.

[*244]

THIS was an action of trover, brought by the plaintiffs, who were manufacturers at *Manchester*, to recover the value of a quantity of goods, which had come to their hands under the following circumstances:—

In the month of *August* 1802, one *Moisseron* purchased at *Manchester*, as agent for the house of *Legrand* and Company, of *Paris*, the goods in question; but he was at liberty to send them anywhere to the Continent he thought best for their interest. * The goods were directed at the time of the purchase to be forwarded to the defendant, who was a packer, employed by *Moisseron*, in *London*, to be packed for exportation. The goods were sent accordingly; and delivered to the defendant on the 3d of *September*. Immediately on their arrival, *Moisseron* went to the warehouse of the defendant *Wright*: he examined the goods; some he took, and re-packed the rest, for the purpose of exporting them.

On the 7th of *September*, news came to *Manchester* that the house of *Legrand* and Co. had stopped payment. Part of the goods then remained in *Wright*'s warehouse. The plaintiff immediately demanded these goods; and having tendered to the defendant the charges which had accrued on them, and which were refused, brought the present action.

The plaintiff's counsel grounded their right to recover, on the right to stop the goods *in transitu*; contending, That the sale was to *Legrand* and Co.; and that, until their getting into their possession, they were *in transitu*; and a right remained in the owners (the plaintiffs) to stop them. *Ellis* v. *Hunt*, 3 Term Rep. 467, was cited.

For the defendant, it was insisted, That their right to stop *in*

transitu was divested by the delivery to *Wright* the defendant, and by the acts of ownership exercised on them by *Moisseron*. 1802.

LEEDS *v.* WRIGHT.

Lord ALVANLEY. The plaintiffs had no right to stop these goods. The sale was here to *Moisseron*; the contract was with him, and the delivery to his order. He was the agent for the house of *Legrand* and Co.; but he had a discretionary power to [245] send them where he pleased. The right to stop *in transitu*, ceases the moment they come into the possession of the buyer, and he exercises any act of ownership on them. It is here in proof, that *Moisseron* unpacked them; and having taken some away, repacked the rest. If that is not exercising the right of an owner, I do not know what is. Can it be said, That he might not have sold them in *London* the moment they arrived? and would not the sale of them have been good?

The plaintiff must be nonsuited.

Cockell, Serjt. and *Holroyd* for the plaintiffs.

Best, Serjt. for the defendant.

END OF MICHAELMAS TERM.

CASES

ARGUED AND RULED

AT

NISI PRIUS,

IN THE

KING'S BENCH,

HILARY TERM, 43 GEORGE III. 1803.

FIRST SITTINGS IN TERM AT GUILDHALL.

February 3d.

Robertson *v.* French.

In an action on a policy of insurance on goods, the supercargo, who was to have had a share in the profits of the adventure, is a good witness, where the goods were lost before they were sold.

THIS was an action of *assumpsit* upon a policy of insurance on goods on board the ship *Chesterfield*, on a voyage from the *Cape of Good Hope* to the *Brasils*.

Loss by confiscation.

Plea of General Issue.

To prove the several circumstances of the interest, loss, &c. the plaintiff called the supercargo as a witness. He was asked, on his *voire dire*, Whether he was not interested in the voyage in question? He answered, That he was to have had one-third of the net profits of the voyage, in case it had been performed; but that he had no other interest whatever.

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Gibbs, for the defendant, then objected: That this was an interest which rendered him incompetent, the policy being on goods, from the sale of which the profits were to arise.

It was answered, That the vessel having been lost before the goods had been sold, and he being only interested in the profits after the sale, there could be no profits where there was no sale; and, of course, he could have no interest in the question.

Lord

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ROBERTSON *v.* FRENCH.

Lord ELLENBOROUGH said, He was of opinion that the witness was competent. The action was to recover the price of the goods which had been on board. The recovery from the underwriters, of the price of the goods which were lost, and from whence no profit could therefore ever arise, was no matter of interest in the witness. The policy covered no part of the profits; it was on the invoice price of the goods only which belonged to the plaintiff, who had shipped them, and to which the witness had no manner of claim.

The plaintiff recovered.

Erskine, *Garrow*, and *Park* for the plaintiff.

Gibbs and *Giles* for the defendant.

SITTING-DAY AFTER TERM AT WESTMINSTER. [248]

MULLETT *v.* HULTON.

Feb. 14th.

Where a libellous letter refers to a newspaper, as containing the slanderous matters imputed to the plaintiff, the defendant may give the newspaper in evidence, in mitigation of damages, under the General Issue.

THIS was an action on the case; for a libel.

Plea of the General Issue Not Guilty.

The declaration stated, That the plaintiff, being a person of good fame, &c. and being about to take a house of one *Salter*, —the defendant, in order to prevent him, and to injure and defame him, addressed a certain letter to *Salter*; and therein said of the defendant, "Mr. *Hulton* (the defendant) cannot for a moment suppose that Mr. *Salter* is acquainted with the newspaper particulars, relative to the party alluded to (meaning the plaintiff *Mullett*) otherwise it is not probable Mr. *Salter* would introduce an acknowledged felon, debauchee, and seducer into the neighbourhood of *Angel Row*."

The plaintiff proved the letter, in which the slander was written, to be the hand-writing of the defendant; and there rested his case.

Erskine, for the defendant, contended, That he was at liberty to go into evidence, that the plaintiff had been in fact a seducer, not as an answer to the action; but in mitigation of the damages. He admitted, that not having pleaded the truth of the words, he could not prevent a verdict from passing against the defendant; but that he having referred to newspaper authority for the words used in the letter, and not having given them as his own, or from [249]

 his

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MULLETT v. HULTON.

his own knowledge, that he should be at liberty to give the fact in evidence as coming from another source, to which he referred in his letter; and as the slander did not proceed from him, it would go in mitigation of damages.

Lord ELLENBOROUGH said, That as the pleading stood on the record, the evidence offered, was inadmissible as an answer to the action. The libel was proved; and there was no justification that entitled the defendant to a verdict; but he added, that as the words referred to a newspaper, and were so written, as a quotation from a newspaper, if the newspaper could be produced, he would admit it as evidence, as having caused the defendant to adopt what he had written in the letter, he having so referred to it.

It was not produced; and the plaintiff recovered.

Garrow and *Comyn* for the plaintiff.

Erskine and *Lawes* for the defendant.

Feb. 15th.

SMITH v. KELBY.

A bill of parcels, on which was written, "Settled by one bill at three and another at nine months," is not admissible in evidence, unless it is stamped.

ASSUMPSIT for goods sold and delivered.

Plea of *non-assumpsit*.

The defence was, That when the goods were sold, it had been agreed between the parties, that the plaintiff was to take the promissory notes of the defendant, payable at different dates; and that the action was commenced before the time expired, for which he was to have credit under the notes.

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* To prove this, the defendant produced the bill of parcels of the goods sold by the plaintiff, and delivered by him. At the bottom of this bill was written, "Settled by two bills,—one at three months, and one at nine months." This was not stamped.

Garrow, for the plaintiff, objected: That the paper offered could not be admitted: That, in fact, it must be taken to be either a receipt, purporting that the goods were paid for by the bills mentioned, and which should therefore have a stamp for receipts; or be taken as an agreement, as to the mode of payment at a future time, which equally required a stamp.

Lord ELLENBOROUGH said, That the paper produced did require a stamp. He considered it as settling the mode of payment between the parties by two bills; which, when paid, would be a discharge of the debt. As it therefore was not the common case of goods sold and delivered, and for which, on delivery,

livery, or according to the settled usage or agreed mode of credit, payment was to be made, but which were to be paid for in a particular way, founded on an agreement between the parties; and as the paper produced was therefore offered in evidence of an agreement to that effect, it came within the words of the statute, and required a stamp.

1803. Smith v. Kelby.

Verdict for the plaintiff.

Garrow and *Wingfield* for the plaintiff.

Erskine and *Lawes* for the defendant.

SITTING-DAY AFTER TERM, IN THE COURT OF KING'S BENCH, AT GUILDHALL.

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Mertens v. Adcock.

Feb. 26th.

In an action on the case, for not taking away goods sold by public auction, and for a loss on the resale, the plaintiff may recover on the count for goods bargained and sold; and it is no objection to his right to recover on that count, that he has not the goods then to deliver, in case he had a verdict.

THIS was an action on the case. The action was brought to recover damages, for not taking away goods sold by public sale, and for the difference in price, being a loss on the resale.

The declaration set out the conditions of sale, and averred the sale of the goods specified. One averment in the declaration, in setting out the conditions of sale, was, "That the purchaser should make a deposit of —*l.* (not setting out on the record any sum whatever;) and that if any purchaser should omit to take away the goods within the time limited by the conditions of sale, it should be lawful to resell them by public sale, or private contract," &c.

The plaintiff proved the purchase of the goods, and the conditions of sale; but it appeared that ten *per cent.* was to be made as a deposit.

Gibbs objected to the variance; and that the plaintiff could not recover.

It was answered by the plaintiff's counsel, who seemed to admit the objection to be valid, that putting that out of the question, there was a count in the declaration for goods bargained and sold, on which the plaintiff would be entitled to recover: That the defendant had become the purchaser; and they were property knocked down to him, though never delivered, by reason of his own default: That he was therefore liable for the price of the goods, as bargained and sold. [252]

Gibbs contended, That he could not be liable: That it appeared,

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MERTENS v. ADCOCK.

ed; in this case, the goods had been resold; and the action was brought for the loss on the resale. In the case of goods bargained and sold, the defendant must be in a situation to deliver them, the contract being on an existing sale and a non-delivery; but here the plaintiff, in case he recovered on the count for goods bargained and sold, would not have the goods to deliver.

Lord ELLENBOROUGH said, That that could not prevent the plaintiff from recovering; for if he had recovered on the count for goods bargained and sold, the defendant might maintain an action of trover for them. As soon as the lot was knocked down to him, he became the buyer: they were goods bargained and sold, &c.

Verdict for the plaintiff on all the counts, except the first.

Erskine, *Garrow*, and *Giles* for the plaintiff.

Gibbs and *Wigley* for the defendant.

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Feb. 26th.

CARTER *v.* BOND.

A bond, conditioning for the production of a box, containing the subscriptions of a friendly society, need not be stamped.

THIS was an action of debt on bond.

The defendant was a publican at *Woodbridge*, in *Suffolk*, at whose house a benefit club used to meet. The box, containing the subscriptions, was entrusted to his care; and the bond, on which the action was brought, was conditioned for the safe keeping and producing on the club-night, in good order and condition, without fraud or deceit, the box, containing the amount of the subscriptions of the benefit society, so held at the defendant's house.

The declaration then assigned a breach; that the defendant did not deliver the box of the society in good order and condition, but on the contrary, delivered it with two of the locks broken, and 82*l.* 10*s.* which had been contained in it, taken out.

The bond, when produced, was not stamped.

This was objected to; but it was answered, That under the statute of 33 *Geo.* III. c. 54, the Friendly Society Act, it need not be stamped.

Garrow contended, That this bond was not within the meaning of the act, which he produced.

Lord ELLENBOROUGH, referring to the act, said, under the words of the act, which he read, he was of opinion, that this was a bond within the act.—*Vide* sect. 4.

In the course of the cause, *Erskine* offered in evidence a paper,

in

in the following words, and signed by the defendant:—"Whereas the box belonging to *the ——— Society, of *Woodbridge*, held at my house, has been robbed of the sum of eighty-two pounds ten shillings, and for which I have given security; and now I do hereby promise to pay the said club the said sum of eighty-two [*254] pounds ten shillings by ten pound a month, until the whole is discharged." He then proved that the defendant had paid 10*l.* in part.

Garrow objected: That this being an unstamped piece of paper, containing a promise to pay, and was a promissory note; and as, on the face of it, it purported to be so, it should have a proper stamp.

Erskine contended, on the other side, That to make a stamp necessary, it must be established, that the paper offered in evidence was one on which the plaintiff proposed to recover, either as a promissory note, or as an agreement; or to use the paper as evidence of an agreement, which the statute required to be stamped; but the action here was on the bond. The paper offered in evidence was not to charge the party with a debt arising under the paper in any respect; in which case a stamp might be necessary, either as note or agreement, or as evidence as agreement. Here the defendant was sued on the bond, an instrument under seal; so that any agreement to pay the money was merged in the bond, and the plaintiff must recover on it, and could not on the simple contract. The paper produced, admitted that the box had been robbed, *valeat quantum valere potuit:* it stated, that he was liable to pay the money taken; he offered it as evidence to that effect, and no more.

Lord ELLENBOROUGH said, he thought the paper was admissible in evidence; the beginning of it reciting that the chest had [255] been robbed, shewed that it never was intended to be, nor could be taken as a promissory note; no stamp therefore appropriated to that instrument was necessary. It was not produced to charge the defendant, nor as a mode of proof to that effect, and did not therefore require any stamp, as not being able to operate for either of these purposes.

Verdict for the plaintiff.

Erskine and *Dampier* for the plaintiff.

Garrow and *Abbot* for the defendant.

1803.

March 1st.

Stoytes *v.* Pearson.

Under the issue of *non est factum*, the defendant may give in evidence that the instrument was delivered as an *escrow*.

THIS was an action of debt on bond.

Plea of *non est factum*.

The defence intended to be relied on was, the bond had been delivered merely as an *escrow*, and not as a deed.

The counsel for the plaintiff relied, that this was a matter which, if true, ought to have been pleaded; and which could not be given in evidence under the general issue of *non est factum*.

The defendant's counsel insisted, That if the fact was that the instrument declared upon was delivered as an *escrow*, it was not the deed of the defendant, and so was good evidence, under the issue " that it was not the deed of the defendant," as he had
256] pleaded; and these authorities were cited, *Comyn's* Digest, title *Fait*; 6 *Mod.* 217; and Sir *Thomas Raym.*

Lord Ellenborough said, That when the objection was first made, it had raised a doubt in his mind, but that it appeared to him, on consideration, that as delivery was necessary to give effect to a deed where an instrument, under seal, was delivered as an *escrow*, the delivery was conditional only, and not absolute. The delivery as an *escrow*, seemed to be a special *non est factum*; and so might be given in evidence, under the issue on the record. He would therefore admit the evidence, and take a note of the objection, if the plaintiff was inclined to move it.

Park and *Marryatt* for the plaintiff.

Garrow for the defendant.

March 2d.

Leeds *v.* Cook et Ux.

Where a letter has been written by the plaintiff to a witness, and the witness has had a *subpæna duces tecum*, but has previously delivered the letter to the plaintiff, who refuses to produce it, parol evidence of its contents is admissible.

THIS was an action on the case, for breach of promise of marriage.

Plea of the general issue.

The plaintiff proved the promise to marry him, made by the defendant's wife before her marriage; and that settlements had been drawn and executed preparatory to it. He then proved, that she had eloped with and married the defendant; and there rested his case.

The defendant and his wife gave in evidence, in mitigation of damages, that the plaintiff had *conducted himself with great impropriety, misconduct, and indifference, while he paid his addresses to her, so that he had received no injury, as to his feel-
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ings,

ings, from her having married: as, in fact, he entertained no serious affection for her.

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LEEDS *v.* COOK et Ux.

Among other matters, That the morning after she had eloped with the defendant, her present husband, he had written a letter to another young wowan of the name of *Turpin*, to whom he had made proposals of marriage.

Miss *Turpin* had been subpœnaed with a *duces tecum* of the letter.

She was called, and asked for that letter. She said, That after the action brought, she had given it to the plaintiff, who said he would send it up to his attorney.

The letter was called for from the attorney, and not being produced, the defendant's counsel proposed to give parol evidence of its contents.

It was objected to, there not being any notice to produce it. To which it was answered, that it could not be known that it was in the plaintiff's possession, as he had clandestinely procured it since the action brought.

Lord ELLENBOROUGH said, he would admit evidence of its contents: That it belonged to the witness called, and was subtracted in fraud of the subpœna: That as therefore the plaintiff secreted it, and had refused to produce it,—*in odium spoliatoris*, parol evidence of its contents should be admitted.

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In the course of the cause, the defendant gave in evidence many expressions used by the plaintiff at different times; in which, speaking of the defendant's wife, he gave great proof of want of feeling, as well as of gross manners and sentiments.

In summing up to the jury, Lord ELLENBOROUGH said, That notwithstanding what had passed, and the promise of marriage proved, if the plaintiff had conducted himself in a brutal or violent manner, and threatened to use her ill, a woman, under such circumstances, had a right to say she would not commit her happiness to such keeping; and she might set up such defence, and it would be legal: but though no such evidence appeared, which went to the ground of action, if the plaintiff appeared to be of gross manners and destitute of feeling; as he complained by this action of an injury in the loss of the society of a woman which he appeared never to have valued, and the pleauress of which society he seemed little calculated to taste, the jury should take it into their consideration in the verdict they were to pronounce.

The jury found a verdict of 1*s*. damages.

Erskine, *Gibbs*, and *Wigley*, for the plaintiff.

Garrow and *Lawes* for the defendant.

ISRAEL

1803.

ISRAEL *v.* CLARK and CLINCH.

Though there are no more outside passengers on a coach than are allowed by the statute: for an accident arising from a want of strength in any part, the owners shall be liable.

THIS was an action on the case, against the defendants, as proprietors of the *Gosport* coach, to recover damages for an injury received by the plaintiff, arising from the overturning of the defendants' coach, in consequence of the axle-tree having broken.

One count in the declaration assigned the injury to have arisen from the overloading of the coach.

Mr. *Erskine* stated it to have been laid down by Lord KENYON, That if the owners of the coach take up more passengers than are allowed by act of parliament, that that should be deemed such an overloading, that in case of an injury being laid in the declaration to have arisen from overloading, the excess above the number should be deemed conclusive evidence of the accident having arisen from that cause.

Lord ELLENBOROUGH assented.

The defendants' counsel directed their cross-examination to prove, That no more passengers were on the roof at the time, than were allowed by act of parliament.

Lord ELLENBOROUGH said, That it was by no means to be taken as a rule, because Mr. *Gamon*'s act allowed a certain number to ride on the roof; that the coach-owners were therefore entitled, at all events, to carry that number; if they carried more, they were liable to its penalties; but it had nothing to do with this question. They might not be entitled to carry so many: it
[260] depended upon the strength of the carriage. They were bound by law to provide a sufficient carriage for the safe conveyance of the public who had occasion to travel by them. At all events, he would expect a clear landworthiness in the carriage itself to be established.

Verdict for the plaintiff.

Erskine and *Marryat* for the plaintiff.

Garrow and *Espinasse* for the defendant.

MASSITER

1803.

MASSITER v. COOPER.

THE declaration stated, That in consideration that the plaintiff had hired a certain chaise and horses of the defendant, to carry the plaintiff from a certain house, called *The Gloucester Coffee-House*, to *Hounslow*; the defendant undertook to carry him: then averred a breach, that he had not done so.

Though a post-master cannot be compelled to hire a chaise, if he does hire it, and the passenger takes his seat in it, the postmaster must proceed if his fare is tendered.

The plaintiff proved, That having been disappointed of a seat in the mail-coach, he sent for a chaise to the defendant, who was a person keeping chaises for hire: That it came; and his luggage was tied on, and he got into it.

The chaise was taken to go from the *Gloucester Coffee-House* in *Piccadilly*, to *Hounslow*. When he was sitting in the chaise, the post-boy came up, and demanded 18*s*. The plaintiff said it was an exorbitant charge: that he would pay him when he got to *Hounslow*, as he could then enquire what was the reasonable fare.

The post-boy said, If he did not, he should not go in the chaise; but he would take 16*s*.

The plaintiff gave the same answer as before, and the driver went for his master; who came, and held the same language as the post-boy. The plaintiff afterwards tendered the 16*s*. which the defendant refused to take; and drove off the chaise into the defendant's yard; and the plaintiff was obliged to hire another chaise. [261]

Erskine for the defendant. There is no particular rate at which persons are bound to let out their chaises and horses. If a man deals with me for my chaise, he cannot take me out of the usual course of my business. If a man hires a chaise, he must take it at the hire the owner imposes, unless there is a special contract, or the owner has an established mode of dealing: if it had not been his usual course of dealing to demand the payment before the chaise went out, he had no right to stop it after the hiring it, and the plaintiff had got into it; but if it was his usual course, he had a right to say that no person should have it on any other terms.

Lord ELLENBOROUGH, in summing up to the jury, said, In ordinary cases, if a person is permitted to go into a chaise, and to put on his luggage, it is too late for the person who hires out the chaise to object to its going on the journey. The owner might make his own regulation: he might say he would not let

strangers

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strangers have his chaise, nor go at night, unless the money was paid before-hand; and if it is the usual mode of his dealing, he had a right to insist on it: but even if that was the course of his dealing, if the person was in the chaise, and tendered the money, the owner of the chaise was bound to proceed on the journey: [262] there was an inception of the contract, and he was bound to complete it. If therefore the jury find the tender, the plaintiff was entitled to recover.

Verdict for the plaintiff.

Gibbs and *Lawes* for the plaintiff.

Erskine for the defendant.

THOMAS *et alt.* v. DAY.

A warehouseman is liable for goods lost or injured, from the time the crane is applied to raise them into the warehouse and it is no defence that they were injured by falling into the street from the breaking of tackle, the carman who brought the goods having refused the offer of slings, for further security.

THE declaration stated, That in consideration that the plaintiff had sent and delivered six packs of linen, to be housed, lodged, and warehoused in a certain warehouse of the defendant: That the defendant undertook safely and securely to take care of, lodge, and warehouse them: then assigned a breach, that he did not safely and securely lodge, house, and warehouse them: That two packs of linen were damaged and spoiled, by being left in the open street, after falling on the pavement, and thereby wetted and spoiled.

The plaintiffs were shipping-brokers; the defendant was a warehouseman.

It was proved by the plaintiffs, That, on the 2d of *July*, they had sent the six packs of linen in question to the defendant's warehouse: That the person sent saw the defendant's clerk, who gave him the tackle which he applied to the packages; and removed five into the warehouse; and the sixth was left in the crane when he went away, the defendant's servant having paid the carriage.

Another witness then proved, That in a short time after, going by, he found one of the packs in the street. [263] It was drenched in water; and seventy-nine pieces of linen spoiled.

The defendant denied that he was liable to make good the damages, on the ground that the accident had happened from the cords of the packs breaking, his servant having offered to give slings to the carman to make them more secure; which had been refused:

refused: That it was the duty of the person sending the goods, to see that they were well corded and secured, so that if any accident happened from their breaking, the warehouseman was not liable. 1803. THOMAS et alt. v. DAY.

These facts he proposed to prove; and that, in addition to it, warehousemen did not consider themselves as liable by usage, under the circumstances above stated.

Lord ELLENBOROUGH said, The whole question turned upon the single point of, When the warehouseman's liability commenced, and the agency of the carman ended? for until the goods were delivered to the warehouseman, the carman was to be considered as the agent of the person sending them; butwhen the warehouseman took them into his own hands, the moment the warehouseman applied his tackle to them, from that moment the carman's liability commenced. It has been urged, said his Lordship, That the defendant's servants offered him the use of slings. These are provided by the defendant; and he is bound to see that they are of sufficient strength, and fit for the purpose; and he should not apply his tackle, unless that could be performed which he was bound to. If the slings were necessary, the refusal of the carman, on his declining the use of them, will not [264] exempt the warehouseman: he ought to have insisted on the carman's using them; and if he refused, he should have repudiated those goods, and refused to accept them.

It appears here that the damaged pack of linen was in the crane, and lifted from the cart: it was then in his possession; and being so, I think, in point of law, he is liable for the loss.

Verdict for the plaintiff.

Garrow, *Park*, and *Cowley* for the plaintiff.

Erskine and *Gibbs* for the defendant.

WITHAM v. LEE.

March 3d.

Where a note, not void, but voidable, as given for what is *malum prohibitum*, is given up in consideration of another note given at a distant day, the illegality of the consideration of the former note cannot be set up in an action on the latter.

ASSUMPSIT to recover the amount of two promissory notes given by the defendant, payable to the plaintiff for the sum of 70*l.* and 34*l.*

The circumstances were these:—The defendant had given to the

1803. the plaintiff's father a note for 100*l.*: the plaintiff had administered to him.

WITHAM v. LEE.

After the death of his father, he had sued the defendant; but had, upon the solicitation of the defendant, agreed to divide the debt, and to take the two promissory notes, upon which the action was brought, payable at distant and different dates.

The defence relied on was, That the plaintiff's father and the defendant had been concerned in lottery insurances together; and that the note given to the plaintiff's father was given for
[265] that consideration: and it was contended, That the consideration of the first note being void, it could not be made good by the substitution of the notes in question; but that they should be affected with the same illegality, and the plaintiff thereby disabled from recovering.

The plaintiff's counsel contended, That the giving the new security was a waiver of any objection to the illegality of the first note, even had there been such illegality in the consideration as was stated, but which they denied; and referred to the case of *Cuthbert* v. *Haley*, 8 T. Rep. 390.

Lord ELLENBOROUGH said, There might be a difference in what constituted the consideration of the first note, as to its effect on the substituted ones. If the consideration of the first note, was *malum in se*; or if the consideration of the first note was what the law has declared should render the security void, as for gaming or usury, the substitution of the second notes could not make them good: but when the consideration was merely *malum prohibitum*, he thought there was no objection to a party waiving such objection: That if it appeared that the notes upon which the action was brought had been voluntarily given, and the first note given up in consideration of the plaintiff receiving the others, he was of opinion, the plaintiff was entitled to recover on them.

The plaintiff proved that they had so been given, and the former note delivered up to the defendant; and had a verdict.

Erskine and *Espinasse* for the plaintiff.

Gibbs for the defendant.

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THELLUSON v. COSLING.

March 3d.

To ascertain the date of a declaration of war, the declaration from the Ambassador of the Court abroad, transmitted by him to the Secretary of State's Office, is evidence.

ASSUMPSIT on a policy of insurance on the ship *Malabar*, from the *Mauritius*, in the *Isle of France*, to *Toulon*.

Loss by capture.

The capture was by the ship going into *Cadiz* on the 12th of *March*, 1793, where she was detained, hostilities having then taken place between *Spain* and *France*.

It was stated, That war had not then been declared by *Spain* against *France*; which declaration had not taken place until the 23d of that month. It therefore became material to ascertain when war was actually declared.

Lord ELLENBOROUGH said, That must be proved, not by newspapers, or by such unauthenticated publications.

To prove it, the plaintiff's counsel called a clerk from the Secretary of State's Office. He produced a book, from whence he took a paper; and from which he stated, That war was declared by *Spain* against *France* on the 23d. Being asked what that paper was,—he said, That it was in *Spanish*; and was the declaration made by the Court of *Spain*, and transmitted from thence by Lord *St. Helen*, our ambassador at *Madrid*, to the Secretary of State's Office here.

That was held to be sufficient evidence; and the plaintiff had a verdict. [267]

Gibbs, *Park*, and *Giles* for the plaintiff.

Erskine, *Garrow*, and *Carr* for the defendant.

BROWN v. SAUL.

A tender of a Bank of *England* note is good, if not objected to at the time.

ASSUMPSIT for goods sold and delivered.

Plea of *non-assumpsit* to the whole, except 2*l.* 11*s.*; and as to that, tender and issue on the tender.

The defendant proved, That before the action brought, he tendered to the plaintiff two one pound Bank of *England* notes and eleven shillings in money. The plaintiff refused, saying, That more was due.

The question was, Whether this was a legal tender? and said to have been decided in the Common Pleas not to be a legal tender.

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BROWN v. SAUL.

Lord ELLENBOROUGH ruled, That as the plaintiff had not objected to the notes, and required them to be turned into money, that the tender was good.

The defendant had a verdict.

Espinasse for the plaintiff.

Garrow for the defendant.

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BALLINGALLS *v.* GLOSTER.

An action lies immediately against the indorser of a bill of exchange refused acceptance, without waiting till the time has run for which the bill was drawn.

THIS was an action on a bill of exchange for 250*l.* drawn by one *John Gloster*, of the island of *St. Vincent*, on one *Jackson*, in favour of the plaintiff, ninety days after sight. The defendant indorsed it to the plaintiff. The bill was dated the 26th of *March*, 1801.

The plaintiff afterwards presented the bill to *Jackson*, who refused to accept it. The plaintiff then, without waiting for the expiration of the time for which the bill was drawn, brought this action against the defendant, as the indorser of the bill.

It was contended for the defendant, That the bill being drawn at ninety days after sight, the indorser could not be called upon for payment till that time was expired, after the bill had been tendered for acceptance: That the action having been brought before that time, was commenced too soon; and that the plaintiff should therefore be nonsuited.

It was answered for the plaintiff, That the moment the acceptance was refused, the holder had a right to have recourse to the indorser, as between the indorser and indorsee, the indorser was as a new drawer; and that it had been decided in a case in *Douglas* (*Milford* v. *Mayor*, *Doug.* 54.) that where a bill was drawn, payable at any number of days after sight, which
[269] was refused acceptance, that the payee was not obliged to wait till the expiration of the number of days mentioned in the bill, but might have recourse immediately to the drawer, from whom he received it: That on principle, there was no difference between that case and this, as the indorser was as a drawer to the indorsee.

Lord ELLENBOROUGH ruled, That the plaintiff's action was well brought: That he was under no obligation to wait till the expiration of the time mentioned in the bill before he brought his

his action; but might have recourse immediately to the indorser: That the indorser was to be considered clearly as a new drawer, with respect to his indorsee.

His Lordship, however, gave leave to the defendant to move to set aside the verdict.

Verdict for the plaintiff.

Erskine and *C. Warren* for the plaintiff.

Gibbs and *Const* for the defendant.

This cause was afterwards moved; but the Court of *King's Bench* concurred in opinion with the Lord Chief Justice.

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THORNTON et alt. *v.* DICK et alt.

March 5th.

If the drawer of a bill has put his name on it as acceptor, he cannot afterwards, by erasing his name, discharge his acceptance.

THIS was an action of *assumpsit* by the plaintiffs, as indorsees of a bill of exchange for 470*l.* dated the 23d of *September*, 1799, against the defendants, as the acceptors.

The bill was drawn on the defendants from *Liverpool*, by one *Cullen*, payable to the order of *Noble*, three months after sight, and indorsed to the plaintiffs.

Quintin Dick and Co. the defendants, were merchants in *London*, who had been concerned in business with *Cullen* to a very great extent; and, at the time of drawing the bill, were very considerably in advance for him.

The bill came by post to the plaintiffs on the 1st of *October*; and was sent by their clerk, in the usual way, to the defendants' counting-house, and left for acceptance. Contrary to the common course of business, the clerk had not called for it the next day; but had suffered it to remain at the defendants until the 11th. When he called for it, it appeared that the words "accepted the 1st of *October*, 1799, *Q. Dick* and Co." had been written on the bill; but they were then, in a great measure, erased by black ink: there was also an appearance of an attempt to cut off these words; but still enough appeared to shew that words had been erased; and, in fact, it was not denied by the defendants.

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The counsel for the defendants, upon this state of facts, relied, That the defendants could not be charged as acceptors of the bill, nor be liable in that character: That the reason for leaving the bill with the drawee was, for the purpose of giving him time to look into the state of the account between the

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drawer and himself, in order to regulate his conduct with respect to the acceptance: That he therefore was not bound by the act of writing on the bill, until he had delivered it out as his acceptance; and thereby sent it accredited into the world. Had the case been put of a bill, upon which drawee had inadvertently, at first, put his name, but afterwards finding from circumstances, that, in point of prudence, the bill ought not to have been accepted, it was contended, That as to third persons, this should not bind the drawee; but that he should be at liberty to erase the acceptance which he had written: That here the bill having been left on the 1st of *October*; and when called for, not having the name of the defendants on it, that it could not be considered as an accepted bill.

On the other side it was contended, That the defendant had made himself absolutely liable, by putting his name on the bill; and that he could not recall it. On the 1st of *December* the plaintiffs were entitled to a bill, accepted by *Quintin Dick* and Co.; and they could not discharge themselves by their own act. It was also stated, That in the case of *Trimmer* v. *Oddy*, before Lord KENYON, this point had been decided, that the defendant was bound by his acceptance, once made, though afterwards erased.

[272] Lord ELLENBOROUGH asked, If the acceptance was legible?

It was answered, That the facts stated, with respect to the erasure, were admitted.

His Lordship then said, That in the case cited, there had been no doubt as to the law; but the difficulty then was, Whether the bill, which was produced in a defaced state, had ever been accepted? So that it became a question, Whether it should have been declared on as an accepted bill, or as a defaced one, according to the truth? But the acceptance having been proved to have once taken place, he had no hesitation in saying, That the act of acceptance was irrevocable; and that if a party once accepted a bill of exchange, he had done the act, and could not retract. The moment the bill was accepted, he was bound, and the bill began to run; and the holder had a right to hold him to that liability which he had undertaken, and from which he, by his own act, could not discharge himself.

One of the jury, which was a special one, after observing on the importance of the question to the mercantile world, asked his Lordship, If there was not a distinction between the cases, where

where the bill was payable after sight, or after date; inasmuch as the bill began to run, after acceptance, where it was payable after sight; but not so where it was payable after date. 1803.

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LORD ELLENBOROUGH answered, That he had no manner of doubt on the case: That there was no difference in point of legal effect, whether the bill was payable after sight, or after date; and that the law was the same as to both. An acceptance [273] once given, could not be recalled. If it was considered as a point of difficulty, or there was a doubt as to the law, the defendant might move for a new trial.

Verdict for the plaintiff.

Gibbs, *Park*, and —— for the plaintiff.

Erskine and *Garrow* for the defendant.

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